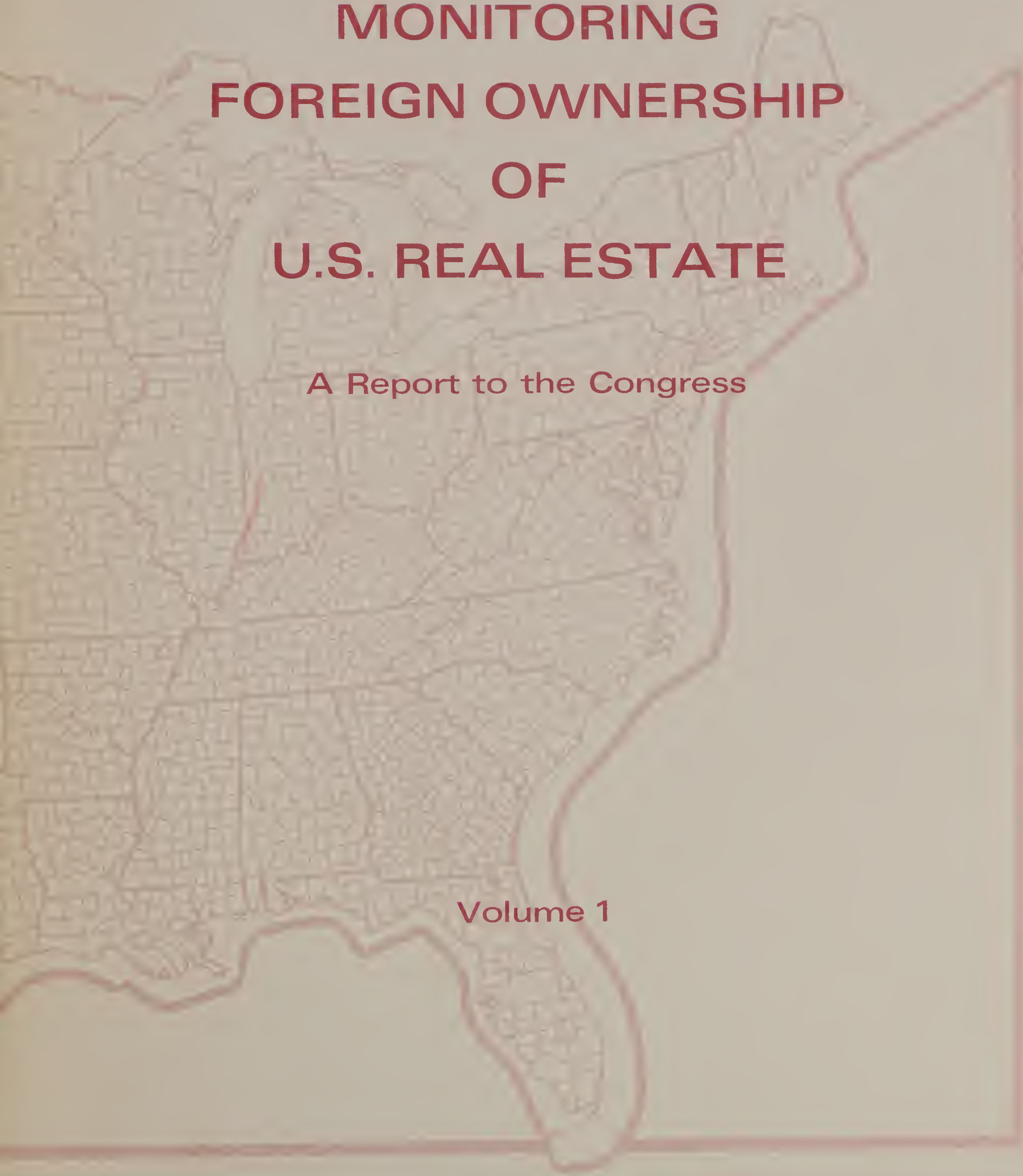
MONITORING FOREIGN OWNERSHIP OF U.S. REAL ESTATE



A Report to the Congress

Volume 1

U.S. Department of Agriculture 1979

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PREFACE

The ancestry of this report may be traced to the Foreign Investment Study Act of 1974. The direct investment portion of that study concluded among other things that reliable information about foreign holdings and transfers of U.S. real estate was incomplete and elusive. Therefore, the authors of the International Investment Survey Act of 1976 (IISA) inserted a special provision--Section 4(d)--to study the feasibility of monitoring foreign investment.

This study was completed during the period September 1978 and September 1979 by a team of contractors and USDA researchers. Its purpose was to examine the feasibility of systems to monitor foreign ownership of U.S. real estate. Therefore, this report does not provide new estimates of the quantity of foreign held real estate, although one chapter does summarize data from available sources.

Real estate represents only about 5 percent of the $40 plus billion direct investment in the United States held by foreigners. However, the small quantity of foreign investment in U.S. real estate does not imply a lack of importance of a system or procedure to determine landownership. There is a concern for the lack of adequate information on landownership regardless of citizenship or residence. Then, too, the somewhat more sentimental attachment to land than some other assets gives it proportionately greater attention. Thus, this report has not been limited to data on foreign investment in real estate but has attempted to examine data systems for landownership generally.

Recently new procedures under IISA have been initiated in the Department of Commerce to obtain inbound direct investment on real estate. These changes have been taken into account to the extent possible in this report, as have the procedures of the Department of Agriculture under the recent Agricultural Foreign Investment Disclosure Act, requiring foreign owners of U.S. agricultural real estate to register their holdings with the Department.

ACKNOWLEDGEMENTS

It is possible to acknowledge only a few of the many persons and organizations who have participated in this study and preparation of its report. First of all to the authors whose names are shown on the various chapters should be given special recognition. These authors have completed their assignments superbly under difficult circumstances. Others who contributed substantially to the report preparation but do not appear as authors are: Don Barr, Commonwealth of Massachusetts; Clifford A. Zoll and Donald A. Zoll of Clifford A. Zoll, Blackmore and Associates; Hartmut Zeimann, Canadian Institute of Surveying; Hans K. Larsen, University of New Brunswick; and the Lincoln Institute of Land Policy. The project profited from the suggestions of outside reviews by Hugh Brodkey, Chicago Title and Trust; William Sayre, Continental Illinois Bank; Noel Nellis, Morrison and Forester; Kenneth Kerin,

National Association of Realtors; Steve Bittel, Langer and Blass; James Wead, J.K. Wead and Associates; and Kenneth Dueker, University of Iowa. These reviews are the personal views of the reviewers and not necessarily those of the institutions or organizations with which the reviewers are associated. Oversight and report review was obtained from a committee of Federal agency representatives chaired by Milo Sunderhauf, Office of Federal Statistical Policy and Standards; other members of the Federal oversight and review committee were Raymond Dideriksen, U.S. Department of Agriculture; Truman Goins, U.S. Department of Housing and Urban Development; Wynne Maule, U.S. Department of Agriculture; Ross D. Netherton, U.S. Department of Transportation; John O. Phillips, National Oceanic and Atmospheric Administration; Jacob Silver, Bureau of the Census; Grover B. Torbert, U.S. Department of Interior; Marshall Wright, U.S. Geological Survey; Milton Berger, U.S. Department of Commerce; Charles Ellett, Office of Management and Budget; Molly Frantz, Office of Management and Budget; Harry Greubert, U.S. Department of Treasury; George Kreur and James Bomkamp, Bureau of Economic Analysis; and Robin Raffel, U.S. Department of State.

Doris Coe and Verla Rape typed most of the USDA manuscript. Mrs. Rape also arranged contractors meetings, maintained records and project budgets and assisted in countless ways to facilitate the projects' progress.

Peter DeBraal guided the studies associated with Scenarios I and II and David Moyer with Scenarios III and IV. Karl Gertel directed the economic studies which appear as chapters 13, 14 and 15. DeBraal, Moyer and Gertel also participated in the overall project design and implementation.

The report was edited by James R. Madison, P.J. Associates.

Hundreds of attorneys, brokers, public officials and citizens have contributed to the understanding of the authors, reviewers, and editors. We hope that understanding is properly reflected in this report.

October 1979 GENE WUNDERLICH

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Chapter 1

INTRODUCTION

Gene Wunderlich, J. Peter DeBraal, Karl Gertel,
and D. David Moyer*

This report answers in some detail the question: "Is it possible to monitor foreign holdings and transfers of U.S. real estate?" The almost obvious answer is: "Yes, but to what level of detail do we wish to proceed?" The monitoring system can be of a more or less superficial nature, or the system can go to any legal and economic lengths to acquire all of the data on every parcel of land. The answer in this report, therefore, is a qualified yes. The discussions that follow pertain directly or indirectly to those qualifications.

BACKGROUND

Recent reports about foreign acquisition of U.S. real estate touch on several important economic, social, and political questions: Do farmland purchases by foreign investors limit opportunities for American farmers to buy land? Do foreign purchases overheat the real estate market? Will U.S. land resources be exploited for foreign benefit? Do treaties and tax havens operate to the advantage of foreign investors? Will foreign control of resources eventually influence U.S. Government policies? Will foreign firms be unresponsive to employment, community development, and national security needs?

Unfortunately, these questions cannot be answered adequately with available facts about the quantity and form of foreign ownership of U.S. real estate.

The most recent national data on foreign ownership of all U.S. real estate are from the Benchmark Survey of the Department of Commerce, which in 1975 surveyed all 6,000 foreign firms and individuals with direct investments in the United States. Some 4.9 million acres were held by persons owning at least 200 acres each. This estimate may be low because owners of less than 200 acres were not included and some

*/ Staff members of the Economics, Statistics, and Cooperatives Service, U.S. Department of Agriculture.

investors buying directly through small brokers may have been missed. On the other hand, some offshore lands may have been reported, in which case the survey would have overstated the foreign-owned land as a part of the United States; we have no accurate way of knowing positively. Even with substantial allowances for undercounting, foreign ownership in 1975 still would have been less than 1 percent of the 1.3 billion acres of private land.

Of course, land purchases may not be evenly distributed among States, and not all land is of equal economic significance. Thus, foreign ownership of land, although it represents a small proportion nationally, may be of greater significance in certain States and regions.

Despite the fact that foreign investment in urban real estate--shopping centers, office buildings, and other commercial property--is far greater in value than rural, particularly farm real estate, public concerns seems to have focused on farmland. Since the Benchmark Survey, there have been a number of highly publicized purchases of farmland by foreign investors--6,000 acres in Utah, a 12,000-acre farm in Illinois, a 23,000-acre ranch in Wyoming, and 17,000 acres in Georgia, for example. Some accounts are specific, such as the 453-acre Locksley estate in Virginia sold to a German family. Other accounts are more speculative, such as the estimate that 100,000 acres in Montana are owned by foreigners. Under its reporting law, Iowa reported that 8,781 acres of farmland were owned by nonresident aliens in 1977, 1/ only a small fraction of the 33 million acres of farmland in that State. Yet, in July 1979, the Iowa law was amended essentially to forbid foreign acquisitions of farmland in the State. 2/

In 1978, data on foreign acquisition of farmland were requested from the U.S. Department of Agriculture's Agricultural Stabilization and Conservation Service and the State Cooperative Extension Services by Senator Talmadge, Chairman of the Senate Committee on Agriculture, Nutrition, and Forestry. For the 18-month period January 1, 1977 through June 30, 1978:

> Sales to foreign investors in the 18-month period amounted to about eight one-hundredths of 1 percent of all U.S. farmland. Sales to foreign investors, as a percent of all farmland sales, were estimated at 2.25 percent.
>
> At the current rate of foreign investment, it would take about 19 years for foreigners to acquire ownership of an

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1/ Iowa Secretary of State, Reports (1978).

2/ See chapter 3, particularly the Appendix, for a discussion of the Iowa law.

> additional 1 percent of U.S. farmland and just over 20 years to acquire ownership of an additional 1 percent of U.S. cropland, provided they did not sell or transfer the land to U.S. citizens. 3/

Although data for the report were collected hastily on the basis of locally available knowledge and may not be precise, they may be assumed to reflect the order of magnitude of foreign acquisition of farmland; i.e., small. Nevertheless, the interest in foreign ownership of farmland has been sustained in passage of the Agricultural Foreign Investment Disclosure Act of 1978 and an inquiry by the General Accounting Office. The former calls for the reporting of all foreign holdings of agricultural land to the Secretary of Agriculture, 4/ and the latter repeats, on a larger scale, an earlier investigation of county-level sources to determine the extent of foreign land acquisition. 5/

The concentration of Congress and the press on agricultural land appears to indicate greater concern in the area of land affected than value of direct foreign investment in real estate. Although the area of agricultural land under foreign ownership is greater than urban land, the value of investment is drastically the reverse. 6/

BASIS FOR THE STUDY

The International Investment Survey Act of 1976 7/ recognized the lack of adequate facts on foreign investment in U.S. real estate and the importance of obtaining good data on such investment for purposes of analyzing the foreign ownership issue. This Act provides continuing authority to collect, improve, and analyze statistics on quantities and flows of direct and portfolio capital among nations. The Act also provides for this special, one-time study which is intended to determine whether and how information on foreign ownership of real estate might be improved. Because this report arose specifically from this Act, its context is prescribed by the Act. Consequently, this study is not designed to systematically gather data on the quantity of foreign investment in U.S. real estate.

Section 4(d) of the International Investment Survey Act provides:

> Sec. 4(d). The President shall conduct a study of the feasibility of establishing a system to monitor foreign direct investment in agricultural, rural, and urban real

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3/ Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Foreign Investment in United States Agricultural Land 75-76 (Comm. Print 1979). (Emphasis added.)

4/ Pub. L. No. 95-460, 92 Stat. 1263 (1978) (to be codified in 7 U.S.C. §§3501-3508).

5/ Senate Comm., *supra* note 3, at iv-v.

6/ *See* chapter 19.

7/ Pub. L. No. 94-472, 22 U.S.C. §§3101-3108 (1976).

> property, including the feasibility of establishing a nationwide multipurpose land data system, and shall submit [an interim report of his findings and conclusions to the Congress not later than two years after the enactment of this Act and a final report not later than three years after the enactment of this Act]. 8/

As a result of two Executive Orders in 1977, 9/ primary responsibility for coordination of functions under the Act was placed in the Department of Commerce. An interagency committee, now chaired by the Office of Federal Statistical Policy and Standards, Department of Commerce, recommended that the Department of Agriculture assume lead agency responsibility for the 4(d) study. 10/ That committee has carried out oversight and review functions for the study.

PLAN OF THE STUDY

By inserting a special provision on real estate into the Act, Congress recognized the peculiar problems of obtaining data from this fragmented, secretive, individualized, often localized industry. Beyond that recognition, however, Congress did not provide guidelines for the scope, methods, or expected results of the study. Absence of specific guidelines for the study meant that the plan of work would be based on an interpretation of congressional intent. Therefore, the plan of study was based on a strict reading of the 4(d) provisions: it was to be of the feasibility of monitoring real estate investment, not actually enumerating or estimating such investment; it was to encompass all uses of real estate, urban and rural; some, or at least one, system examined would be multipurpose--that is, provide land data in addition to foreign ownership. The context of the Act meant that the feasibility of the system or systems would be from a Federal perspective, although the language "nationwide" and "multipurpose" provided the option for intergovernmental systems.

For systematically analyzing the feasibility of monitoring foreign direct investment in U.S. real estate, three dichotomous sets of factors were combined to yield eight possible data systems for analysis.

Initially, the feasibility study, reflecting the language of the legislation, was divided into two distinct approaches based on types of land information systems, direct and indirect. The direct approach examines

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8/ 22 U.S.C. §3103(d) (1976). The bracketed portion is an amendment under Pub. L. No. 95-381, 92 Stat. 726 (1978), which extended the reporting date 1 year, from Oct. 11, 1978, to Oct. 11, 1979, in recognition of the delay in funding. Funds for the study were not received until September of 1978. Pub. L. No. 95-355, 92 Stat. 523 (1978).

9/ Exec. Order No. 11,961, 3 C.F.R. 86 (1978); Exec. Order No. 12,013, 3 C.F.R. 147 (1978).

10/ Letter from James T. McIntyre, Director, Office of Management and Budget, to Bob Bergland, Secretary of Agriculture (Jan. 11, 1978).

those systems designed exclusively for monitoring foreign direct investment in U.S. real estate. The indirect approach examines those systems designed to provide various sets of information of which foreign direct investment information is but one set.

The next step was to decide what kind of information should be collected. Using a classification suggested by Edgar Dunn, 11/ there are two types of information systems, intelligence and statistical. The former provides relevant information for each unit in a given population, while the latter provides aggregate information from a sample of a given population. The distinction between these two types of information is of primary importance for this study because the type of information sought will dictate the resource requirements and influence the design of the monitoring system.

The final step was to consider what role the Federal agency or agencies would have in gathering the information. Should it be a passive or active role? That is, should the Federal agency rely on others (foreign investors, real estate brokers, financial institutions, other Federal agencies, State or local agencies, or whoever) to provide the information--or should the agency actively seek out the information?

The result of these considerations is the schematic description of the eight data systems presented in figure 1. Although only four systems are analyzed in detail in this study, all eight approaches are outlined below. Inclusion of an overview of all eight systems is for the purpose of clarifying the makeup of the systems in general, and to provide a clearer understanding of the reasoning used in the development of the four scenarios that are studied in depth.

System Descriptions

System 1 would establish a Federal agency, the sole purpose of which would be to supervise the central, continuous reporting of all foreign direct investment transactions in U.S. real property.

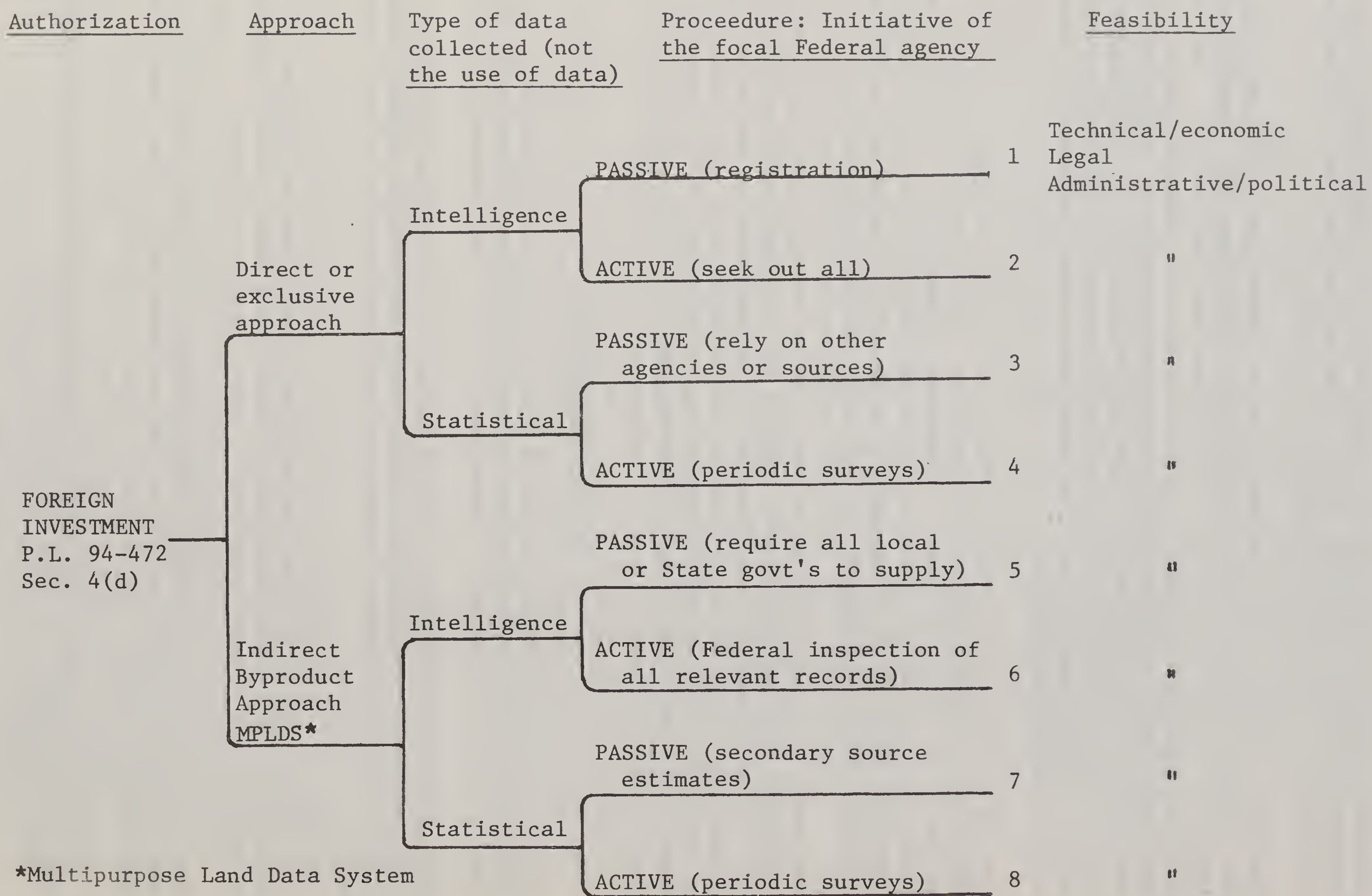
System 2 would establish a Federal agency to actively gather all foreign direct investment real estate information on a regular basis, either through personal contact or questionnaire mailed to all landholders of record.

System 3 would establish a Federal agency to periodically gather foreign direct investment aggregated data from other Federal agencies or sources and provide estimates of such foreign investment.

System 4 would have a Federal agency conduct periodic sample surveys of foreign investors to provide estimates of foreign direct investment in real estate.

11/ E. Dunn. Social Information Processing and Statistical Systems: Change and Reform. J. Wiley & Sons, N.Y., 1974.

Figure 1.--TYPES OF PROGRAMS FOR FOREIGN REAL ESTATE DATA



*Multipurpose Land Data System

System 5 would develop a land record to be maintained in each county. All data files would be based on individual landownership parcels. Reports containing uniformly prescribed data could move through a reporting network, and probably be funneled through an existing State office.

System 6 would require a specified Federal agency to routinely inspect all relevant local, State, and Federal records. The agency would make appropriate comparisons and assemble complete information on all real estate, including information concerning alien individuals who are involved in the purchase, sale, exhange, or management of U.S. real estate.

System 7 would provide estimates regarding specified land data items, based on review of data from secondary sources. It would use States as reporting units [e.g., with USDA's Economics, Statistics, and Cooperatives Service (ESCS) statistical unit in each State having responsibility, possibly tied in with the annual farm real estate value study]. Another possibility could use a regional multi-State basis (e.g., with field groups in the ESCS Natural Resource Economics Division having reporting responsibility).

System 8 would provide land-related information based on the results of periodic sample surveys and censuses. For example, data on foreign direct investment and other land information matters involving real estate could be collected and analyzed as part of periodic surveys <u>not</u> specifically related to foreign direct investment questions (the Resource Economics Survey and the June Enumerative Survey of ESCS are two such vehicles). Another possibility would be to conduct followup surveys and/or carry out additional data processing and analyses of survey data to obtain additional land-related information, including foreign direct investment in real estate.

Some of these systems can be dismissed at the outset as being obviously on the fringe of feasibility or sufficiently similar as to be duplicative. Thus, system 2 was not pursued because it was considered to be (1) too costly vis-a-vis the value of the information obtained and the alternative approaches, (2) probably not politically saleable, and (3) potentially technically and administratively difficult. System 4 was not pursued because of the technical difficulties in ascertaining the population to be sampled and the costs involved in establishing periodic surveys exclusively for foreign investment, particularly when similar information may be gathered under system 8.

System 6 was deleted for several reasons. First, this system would require an active Federal agency program to screen all pertinent land records maintained by local, State, and Federal agencies. Given the wide range of such data and the responsibility for it, it seemed likely that a new Federal agency, rather than an existing one, would be required for this function. Second, even if such a new multipurpose land data system (MPLDS) agency were developed, numerous changes likely would be needed

in data collection and maintenance by agencies whose records were screened. Such changes would be necessary to obtain specific data items, such as information on foreign direct investment in land, as well as to coordinate already existing land information from the various levels of government. Third, since laws relating to real property and real estate records are limited primarily to State and local levels, any legal changes needed could be better effectuated by the approach used in system 5.

System 7 also was eliminated from further consideration after initial analysis. The primary reason for elimination of this system was the necessity for the MPLDS to be able to provide information on foreign direct investment in real estate. Because of the relatively low rate of incidence of such ownership reported in the Commerce Department study in 1976, 12/ it does not appear that review and compilation of data from secondary sources would provide an adequate information base concerning foreign direct investment in U.S. real estate.

Thus, the study pursues the first system, a second system falling somewhere between the second and third systems, and the fifth and eighth systems. Under the second system, a Federal agency would rely on reports supplied to it by other Federal agencies and sources. However, it is doubtful that the information gathered under such an approach would provide statistically reliable data on which estimates could be made because it is unlikely that the samples in the reports received will represent the total population. Consequently, the second system is envisioned as providing intelligence-type information of a limited nature--limited, that is, in the sense that it will not have the potential to provide information on all foreign investors. With the reduction in the number of potential systems, the remaining ones (1, 2, 5, and 8) were renumbered and renamed Scenarios I, II, III, and IV.

Each of the four scenarios is grounded in reality; that is, there is in existence a prototype for each one. An example of Scenario I, the registration system, may be seen in the Agricultural Foreign Investment Disclosure Act registration system. Scenario II, the utilization of existing Federal data-gathering activities, is exemplified by activities in the Office of Foreign Investment in the United States, Department of Commerce. Components of the multipurpose land data system analyzed in Scenario III may be found scattered throughout the country, with perhaps the most developed system in Forsyth County, North Carolina. Finally, an example of Scenario IV, the survey multipurpose land data system, exists in the ESCS Resource Economics Survey of Landownership.

12/ 2 U.S. Department of Commerce, Report to the Congress, Foreign Direct Investment in the United States, 125 (1976).

Feasibility

Feasibility means more than possible. In an abstract sense, virtually anything can be engineered if enough resources are devoted to the project. Consequently, money (economic) and manpower (administrative) criteria must be superimposed on technical feasibility. In addition, legal and political feasibility also must be considered.

Technical, economic, and administrative feasibility are grouped together as one type of feasibility because of the frequency of overlap. Under these criteria, the objective is to determine whether the data sought can be obtained and from what sources at what cost. Such an assessment would require thorough knowledge of data needs, accuracy, currency, security, and tradeoffs among alternatives.

Legal feasibility is an attempt to determine the constitutional bases and current authority for the activity under consideration. It also includes an assessment of the current Federal and State statutory status, legislative and judicial limitations, legal alternatives, and recommended legislative and administrative-rulemaking changes.

Political feasibility seeks to determine whether--after all the technical, economic, administrative, and legal requirements are met--the political circumstances will permit or encourage change, what organizations are needed to implement the changes, whether the system should be centralized or decentralized, and the possible impacts of U.S. actions abroad.

Early in planning the study it was apparent that precise measures of feasibility, even financial costs, would be difficult, often impossible, to ascribe to the scenarios. Each of the scenarios afforded wide latitude in specifying details, and the details often would make major differences. For example, consider the question: "Who are the owners of real estate?" It may be answered by either prescribing the names and addresses of all beneficial owners or merely providing a statistical estimate of the nationality of the nominal owners. There are precedents for both types of information. Similarly, a system might locate information either by listing a State or providing a legal description of the property. It may have been easier, but less useful, to assume a specific detail for each scenario. Instead, some flexibility was allowed so that the evaluation would reveal, at least qualitatively, the tradeoffs that must take place in the eventual implementation of a system.

Feasibility was not designed in yes or no terms, but rather as tradeoffs; that is, if a system of records is to maintain and access data on the ownership of each parcel of land, the cost (whether in cash, effort, or disclosure) is higher than a system to sample informed persons occasionally on general trends in ownership. The purposes served by each of such systems would differ greatly. Feasibility of a monitoring system

can be measured only in terms of purposes and objectives of such a system. This report attempts to illuminate choices among, not merely assume, such purposes and objectives.

The feasibility study includes an examination of available information; one chapter is devoted specifically to the summarization and critique of current sources. This information was drawn from available sources because funding was not available until the end of the period originally provided by Congress, and the 1-year extension of the reporting date 13/ was insufficient to design, pretest, and complete a survey in time to serve as resources to the analysts. However, the decision not to attempt an extensive survey to obtain primary data was based only in part on the limits of available time and resources. The decision was based mostly on the judgment that new data would contribute only modestly to the assessment of feasibility.

INFORMATION ISSUES AND THE STUDY

An inquiry into the feasibility of monitoring foreign ownership of real estate appears to assume that such monitoring is needed and desirable. The broader issues of the informational needs of an organized society are beyond the scope of this inquiry. Nevertheless, this study touches many aspects of these broader issues which impact every chapter of the report. How much, for example, do we need to know about the foreign persons who own U.S. real estate? If we simply wish to trace the flows of investment capital, it may be sufficient to identify only the nominal investor countries. If, however, we wish to identify the countries of origin of investment capital and to know the quantities which investors from nontreaty nations channel investment through nations which have a tax treaty with the United States, the name and address of each specific of each specific owner may be needed.

The broader issues of (1) the right to know or the right not to be known, (2) the uses of information for economic or political power, or (3) the public and private interests in knowledge, impinge on the feasibility of a system to monitor foreign ownership of U.S. real estate in at least five ways:

1. Amount and specificity of data.--In monitoring real estate, what data are needed about the owner, the property and its use, and the method of holding, acquiring, and financing?

2. Currency of data.--How frequently are the data collected and how soon are they available after collection?

3. Access to specific records, data, and information.--Who may obtain what data and under what conditions?

4. Responsibility for providing, collecting, storing, processing, and accessing data and the burden of cost.--Information is valuable and costly; who pays? What information is a public good?

13/ See note 8, *supra*.

5. Uses of data.--What data are needed for analysis and interpretation, public policy, commercial needs, or merely general curiosity?

The reader who seeks a mechanical summarization of benefits and costs of the four scenarios and a simple yes or no answer to the feasibility question will be disappointed. The report does, however, attempt to provide guidance on the development and use of systems which provide data on landownership generally and foreign landownership particularly.

THE REPORT

The report consists of three kinds of chapters: background, evaluation, and general inquiries. The general inquiries in this report are limited to an economic evaluation of foreign investment in real estate (chapters 13 and 15) and a legal view of land records and the disclosure of ownership (chapter 16). The chapters concerned most specifically with the four scenarios are 5, 6, 7, 10, 11, and 12. The remainder of the chapters provide the setting for evaluation (chapters 2, 3, 4, 8, and 14); the development of technical issues--Federal taxes (chapter 17), international information exchange (chapter 18), and cadastres in other countries (chapter 9); an analysis of the available data (chapter 19); and an examination of the foreign investor as an absentee landowner (chapter 20).

Each chapter is the work of one or a small set of authors, and to some extent is self-standing. Readers, therefore may find it useful to read the chapters out of sequence or, depending on their background and interest, omit some entirely. Those familiar with the real estate industry, for example; might easily omit chapter 2. Those interested solely in registering foreign investors might read chapters 3 to 6 and omit the multipurpose chapters 7 to 11, and those interestesd in comprehensive land data systems might do the reverse. Disciplines, too, might be a basis for selection. Chapter 11, for example, is an outstanding lawyer's brief on legal issues pertaining to governmental data systems, and chapters 13 and 15 might be of interest to those concerned with economic aspects.

Reports of this type rarely, if ever, settle issues. They are useful if they add information or perspective, clarify the problems, or provide an improved basis for decisions. In this report, real estate as a foreign investment has been put in its place and its peculiarities described. The lack of information about real estate has more to do with the way it is traded and held than clandestine impulses of foreign owners. Most of the problems of monitoring foreign ownership are the same as those of monitoring domestic ownership. The problem of foreign ownership of U.S. real estate is both smaller and larger than it has been popularly represented--smaller in terms of the proportion of land in foreign ownership and larger as an indicator of inadequacy of statistics on landownership. Recommendations are made in this report, but they are forms and supports for decisions, not specific legislation and rules.

Chapter 2

THE REAL ESTATE INDUSTRY AND THE FOREIGN INVESTOR

Jack P. Friedman*

The real estate industry is huge. It is also highly fragmented. Numerous persons representing many different occupations are employed in the real estate industry and would be engaged in the sale of any parcel of real estate. Employment in the real estate industry (defined as including contract construction, real estate services, and financial services) provides approximately 5 million jobs, which represent approximately 6.5 percent of total U.S. employment. 1/ Of that employment, approximately 60 percent is in construction, 20 percent in finance and insurance, and the remaining 20 percent in real estate services, which include appraising, assessing, brokering, syndication, counseling, management, education, and licensing. 2/

Although many documents are prepared for each transaction, there is no single place in which a complete or even nearly complete package of documents is regularly maintained. Consequently, though there may be a great deal of information available about each parcel of real estate and its improvements and many records supporting ownership, present practices do not facilitate gathering and summarizing property and ownership information.

Though the majority of real estate transactions are completed privately (buyers and sellers meet and negotiate quietly, and actual prices are not a matter of public record), large transactions do not go unnoticed in the local real estate community. Especially large sales (over $20 million) are apt to be publicized statewide or even nationwide through newspapers and business periodicals. The broker who arranges the sale, the banker who arranges financing, and others involved often advertise the facts and are likely to prepare press releases. Consequently, if

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*/ Jack P. Friedman, Ph.D., CPA, is Head of the Research Division, Texas Real Estate Research Center, Texas A&M University, College Station, Tex. Dr. Friedman gratefully acknowledges contributions from Mira Wilkins, Ph.D., Professor of Economics, Florida International University, Joan Perry, Ph.D., and Herman Berkman, Ph.D., Professor, New York University.

1/ Alfred A. Ring and Jerome Dasso, Real Estate Principles and Practices (Englewood Cliffs, N.J.: Prentice-Hall, 1977), p. 24.

2/ Norman B. Ture, Real Estate in the U.S. Economy (Washington, D.C.: National Realty Committee, 1977), table 10 [not paginated].

the purpose of an information system to monitor real estate transactions is to gather information on large transactions (say over $10 million), then a newspaper and magazine clipping service could accomplish this goal with a reasonable degree of confidence. But if the purpose is to include every transaction—lots, homes, condominiums, and the like—the task requires special efforts because of the nature of the existing reporting systems in the United States.

The purpose of this introductory chapter is to describe the general character of the domestic real estate industry, as well as the uniquenesses and similarities of the channels and processes of foreign investment in U.S. real estate. The observations about motivation, nationality of ownership, types of transaction, and other matters are based upon extensive informal interviews and other research. In all cases, however, there are exceptions.

REAL ESTATE INVESTOR MOTIVES

Nearly 65 percent of the dwellings in the United States are owner-occupied. 3/ The vast majority of these dwellings were acquired principally as a place to live, as opposed to an investment vehicle. But many U.S. citizens and foreigners seek real estate as an investment. John F. Timmons identifies and presents 12 kinds of incentive for foreign investors in U.S. land: 4/

1. Hedge against inflation
2. Safety of investment
3. Capital appreciation
4. Income flows
5. Tax advantages
6. Value of the U.S. dollar versus other currency
7. Access to resources and technology
8. Access to internal markets for products and components
9. Balancing investment portfolios
10. Capital and personal havens
11. Intangible benefits
12. Control factors

Incentives 1, 3, 4, 5, 9, and 11 are of importance to U.S. citizens investing in real estate as well as to foreign investors. They are discussed first. Incentives 2, 6, 7, 8, 10, and 12 are not of prime importance for U.S. citizens, though they may be reasons for foreign investment in U.S. real estate; discussion of them follows. Timmons makes no attempt to rank or order these incentives, "since their relative importance

3/ Savings & Loan '78 Fact Book (Chicago: U.S. League of Savings Associations, 1978), p. 36.

4/ U.S. Department of Agriculture, Economic Research Service, Foreign Investment in U.S. Real Estate (Washington, D.C.: Government Printing Office, 1976), pp. 5-6.

depends largely upon the preferences of individual foreign investment entities." 5/

Incentives for Both Foreign and Domestic Investors

Hedge Against Inflation

Many investors acquire real estate as a store of value. In the long run, land prices tend to rise with inflation, keeping pace with the price level of other commodities. Improvements to and on land are considered to be long-lasting. As the price of bricks, lumber, concrete, and other building materials rises, along with the wages paid to artisans, replacement costs for improved real estate increase. Prices paid for existing real estate rise with higher replacement costs.

The United States has experienced substantial inflation in the past 15 years, but the rate has been lower than in many other countries. Italy and Great Britain have experienced double-digit inflation for years, and Brazil and Chile have suffered three-digit inflation. Many foreign investors believe that the United States has the mechanisms needed to manage inflation and will implement them to prevent runaway inflation.

Capital Appreciation

Independent of inflation, there are good prospects of capital appreciation for land and improved properties. Speculators and other landowners in the path of growth can enjoy windfall gains as rural areas become urbanized. Residential owners gain price increases independent of price inflation because stricter environmental regulations and building codes and higher interest rates increase replacement costs. In growing areas, the prices of existing property tend to rise with increases in replacement costs. Higher interest rates necessarily cause rental rates to increase before new construction becomes feasible, since rentals must cover the increased debt service requirements. As for the number of residential units needed, the trend toward zero population growth in the United States will probably be offset by the trend toward smaller household size. 6/

Income Flows

The cash flow generated by the excess of rentals over combined operating expenses and debt service may provide a rate of return on equity that is competitive with other investment alternatives. Though there is always

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5/ Ibid.

6/ Robert L. Skrabanek, "Remember the 3.3 Person Household? Well, Forget It," Tierra Grande, First quarter 1978, pp. 8-10.

the possibility of Federal or local rent controls, 7/ many investors perceive such controls as unlikely at either level, or at least less likely than in many countries outside the United States.

Tax Advantages

Cities, counties, school boards, and, in some areas, states, collect an ad valorem tax based on the value of realty within their jurisdictions. These are considered operating expenses of improved real estate and can usually be passed along to tenants in the form of higher rents.

Improved real estate is often used for income tax shelter, as the real estate can generate income tax losses to offset income from other sources. Ordinary and necessary operating expenses, depreciation, and interest on indebtedness in a trade or business are allowable tax deductions. If the total of these allowable deductions exceeds rental income, a tax loss is generated. Since depreciation is a noncash acounting deduction, allowed for land improvements irrespective of any increase in property value or rent, rental property can generate a tax loss and at the same time provide cash flow and value appreciation. This is an important tax advantage for U.S. citizens but is not as important for most foreign investors.

Balancing Investment Portfolios

Spreading the risk among various investments—"diversification"—can serve to preserve principal and income. Diversification policies relate both to the type of investment and to geographical distribution. Large pension plans and life insurance companies acquire—in addition to securities—real estate and mortgages. The type of property, e.g., shopping centers, office buildings, or apartments, is important to many. Geographical dispersion is also important, and investing in other countries greatly broadens diversification for both U.S. and foreign investors.

Intangible Benefits

Pride of ownership, community involvement, prestige, and other psychological benefits are thought to motivate some to acquire real estate instead of other, intangible investments. 8/

7/ As of mid-1976, rent controls were in effect for approximately 230 communities containing roughly 15 percent of all urban dwellers. (Most of this 15 percent, however, live in their own homes or apartments not subject to rent control.) Almost twice that number reside in areas where state and local governments have considered rent control legislation. Source: International Real Estate Markets: A Comparative Study of Selected Nations (Chicago: National Association of Realtors, 1978), p. 21.

8/ William C. Weaver, Nicholas Ordway, and Dennis Tosh, "Satisfying

Additional Incentives for Foreign Investors

Safety of Investment

The political, legal, social, economic, and defense stability of the United States provides assurance of investment safety for foreign investors. Many foreigners are concerned about the safety of investments in their homelands. They perceive the United States as holding a much more stable posture. For example, at this writing, Canadians are reported to be investing heavily in the United States, partly because of political uncertainty in Quebec. 9/ Affluent Italians have reportedly been smuggling money out for years in fear of a Communist electoral victory. Other countries are threatened by Communism either from within or from outside their borders.

U.S. Dollars Versus Other Currency

Despite the substantial weakness of the dollar compared with the Japanese yen and most West European currencies in the past few years, it is still considered one of the world's strongest currencies. Its relative stability and worldwide acceptability provide comfort for foreign investors, and U.S. investment is particularly attractive before a major devaluation of a foreign currency. 10/ On the other hand, those holding currencies that have appreciated against the U.S. dollar may find that U.S. real estate offers "bargains."

Access to Resources and Technology

U.S. land may provide minerals, timber, and access to other natural resources and technology that are not readily available in foreign countries. These resources and this technology can be used in the United States and/or transferred to the home country.

Investment Needs," Real Estate Today 2 (1979):46-50.

9/ Mira Wilkins, Foreign Enterprise in Florida (Gainesville, Fla.: University Presses of Florida, 1979), p. 22.

10/ John R. Biggs, Jr., head of the real estate division of Underwood Neuhaus & Co., Houston, was quoted in the September 6, 1976, Business Week as saying, "Many buyers will accept low returns just to get their money out of Mexico." Their timing was excellent, as the value of the Mexican peso in relation to the U.S. dollar dropped by half shortly after that article appeared. In a telephone interview, Charles A. Shelton of Underwood Neuhaus's real estate department advised that Mexican investment is not nearly so strong as it was before the peso devaluation.

Access to Internal Markets

U.S. markets can be important to specific foreign investors. For example, several European and Japanese auto manufacturers have been seeking U.S. locations for assembly plants, and British Petroleum has benefited from its U.S. market for the products it trades. Volkswagen recently began U.S. production of Rabbits—the first came off the assembly line in 1978.

Capital and Personal Havens

Some foreigners have established property and/or business bases in the United States as a potential escape from internal disorders in their homeland. Early establishment of such bases facilitates future movement of both flight capital and families. It provides important communication channels and might provide the necessary visas for permanent residence in the United States.

Control Factors

Some foreign investors may want U.S. real estate for purposes of influencing political and economic policy within the United States. Consideration of such a policy matter is beyond the scope of this report.

FOREIGN INVESTORS IN THE UNITED STATES

"The behavior of the foreign developer and/or investor in the United States real estate market is remarkably similar to that of his American competitors." 11/ There may, however, be differences between U.S. and foreign investors in investment objectives, because of homeland ownership patterns, in personal motives, and in financing.

An example of the difference in investment objectives is that foreigners may acquire farmland that has little or no current income. Some remember the difficulties of buying food at any price after World Wars I and II. Farms in their homeland may sell for prices that result in little or no cash flow on equity. Consequently, when buying U.S. farmland, they may be pleased to get a 3 or 4 percent current return on their investment.

The personal motives of some foreign investors include a desire to place some of their investments outside their homeland. U.S. citizens do not, of course, shere this motive when they invest in U.S. real estate. Some foreign investors may be motivated to purchase real estate because they feel it offers intangible benefits that help satisfy personal needs for self-actualization, self-esteem, and belonging.

11/ Paul B. Farrell, Jr., "Strategies for Foreign Corporations in the U.S. Realty Market," Real Estate Review 3 (1974):29.

As for financing, a foreigner may feel more comfortable with high equity in real estate projects than an American real estate entrepreneur would because the degree of leverage available in his homeland is much less than in the United States. Some foreigners who wish to remain anonymous cannot get the same degree of leverage as those subject to credit checks and therefore will employ more equity.

Investment Objectives

Specific investment objectives for foreigners investing in U.S. real estate run the gamut from "Mom and Pop" operations to a desire to "invest like the Pru [Prudential Insurance]" 12/ or a search for "the real estate equivalent of a convertible debenture." 13/

Foreign real estate investors can be categorized into six groups:

1. "Mom and Pop"
2. Wealthy individuals
3. Institutional investors
4. Developers
5. Syndicators
6. Industrial and commercial companies

"Mom and Pop"

The "Mom and Pop" investor is a businessperson. By making a relatively small cash investment in a U.S. business, the investor can sometimes secure a permanent resident visa, which allows travel back and forth between the investor's homeland and the United States. For some, the motive is to facilitate entry into the United States in the event of political or economic turmoil in their homeland. Motels are popular businesses because they can be operated with little knowledge of the English language. Motels often require long working hours and low wage rates to be profitable, but many foreigners, with their families, are willing to make these personal sacrifices. In addition, the motel that they own provides a comfortable home for them. Other businesses that are popular with "Mom and Pop" investors include restaurants and retail stores. When foreign business people migrate to the United States, they become resident aliens, and their investments are not classified as "foreign" by U.S. Department of Commerce definitions. However, applications for visas by people who intend to establish a U.S. business fall under the "investor" provisions of the "nonpreference" immigration category. The Immigration and Naturalization Service's Immigrant Visa Control Branch advised that, as of January 1979, there was a backlog of 363,691 applications for nonpreference visas. 14/

12/ "Tougher Bargain Hunting for Foreign Investors," Business Week, September 6, 1976, p. 62.

13/ Daniel Rose, quoted in "Tougher Bargain Hunting."

14/ Telephone conversation with Brenda Dow, Immigrant Visa Control

Wealthy Individuals

Wealthy investors seek U.S. real estate not only for its income potential but also as an inflation hedge, for added portfolio diversification, and because of other factors. Some of them prefer not to own any rental property that could house a bed, including apartments and hotels, as they are concerned about potential rent controls and antagonism against foreign ownership. West Germans have bought farms in the East and Midwest as well as shopping centers and office buildings. Argentines have reportedly bought cattle ranches, shopping centers, industrial parks, and some apartments. Many have bought condominiums in New York and Miami for their personal use and/or other residences as second homes.

Institutional Investors

Institutional investors are primarily seeking long-term stable income and value. They tend to want prime property with inflation protection. British insurance companies and pension funds, for example, want office buildings that will be economically useful for the next 100 years. Shopping centers with percentage rent clauses are also acceptable since there is some inflation and competition protection.

Real Estate Developers

Real estate developers, mostly from Canada, are skilled in the entire development process. They are financially well backed and are sophisticated about consumer tastes and preferences. On a per capita basis, Canada has seen more development than the United States in recent years; in other words, the Canadian market is saturated in comparison to the United States. Several Canadian developers are completing large projects in the United States, including residential, shopping, and office space. A few British and Australian companies are doing much the same.

Syndicators

Syndicators buy U.S. property and sell it in small denominations in their homeland. A notable example is the Deutsche Bank of West Germany, which bought 80 percent of Pennzoil Place in Houston for a reported $92 million. The bank then sold interests to West Germans in approximately $5,000 denominations. Syndicators of smaller properties also exist.

Industrial and Commercial Companies

Industrial and commercial companies need real estate as physical shelter for U.S. operations. Japanese, West German, British, and French companies

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Branch, July 1979. However, see "Wealthy Foreigners Use Ploys to Qualify as U.S. Immigrants," Wall Street Journal, June 21, 1979.

are the most notable. Changed monetary exchange rates have made manufacturing in the United States more attractive; so some industrial companies have bought or leased industrial space, warehouses, and retail outlets.

Industrial and business development agencies of many states woo foreign business. Pennsylvania = Business, a brochure published by Pennsylvania's Bureau of International Commerce, is available in French, German, and Japanese translations. California Profile, from the California Department of Economic and Business Development, has been published in Japanese. Foreign companies have bought banks, retail stores, and other businesses. However, the "real estate" discussed in this report is the purchase of real estate, not the purchase of businesses; although purchasing a business might involve acquiring the real estate occupied by the business, it is also possible to purchase the real estate without purchasing the business.

The principal motives of each type of foreign real estate investor, along with the type of property typically sought and the typical homeland, are summarized in table 1. It should be emphasized that the table is not to be considered inclusive of all investors, motives, properties, or homelands—just several commonly observed combinations.

Investment Channels

Principals

Real estate transactions normally begin when a principal (buyer or seller), or someone with power of attorney given by a principal, considers the purchase or sale of real estate. A principal may deal directly with other principals or may seek the assistance of one or more real estate brokers.

A principal who decides to sell on his own will typically advertise "for sale by owner" in the classified sections of newspapers and/or by signs posted on the property. Interested principals or brokers contact sellers directly, first by mail or telephone and then, if still interested, in person at the property site. Some sophisticated principals decide exactly what property they want to buy, then find the owner and deal with him or his broker.

Though statistics are not maintained, it is accepted that most transactions involve one or more brokers. Principals may find brokers through referrals of friends and business associates, attorneys, CPAs, appraisers, and other professionals. Broker advertising includes signs posted on property, and radio, television, and newspaper advertising is also effective. Before entering a strange city, principals may ask brokers they know to refer them to out-of-town brokers. Since many brokerage firms are now members of a franchise 15/ or of a national referral

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15/ Over 17 percent of brokerage firms are franchised, according to the "Survey of Franchise and Referral Firms" (Chicago: National Association

Table 1—Characteristics of foreign investors

Type of investor	Principal motives	Type of property sought	Typical homeland
Mom and Pop	Cash flow Inflation hedge Appreciation Visas Safety Prestige	Motels Hotels (small) Restaurants Retail stores	Taiwan India Iran
Wealthy investors	Cash flow Inflation hedge Appreciation Diversification Safety Currency strength	Farms and ranches Office buildings Shopping centers Apartment complexes Warehouses Condominiums	Canada West Germany Great Britain Italy Mexico South America
Institutional investors	Cash flow Inflation hedge Appreciation Diversification Safety Currency strength	Shopping centers Hotels (large) Office buildings Apartment complexes (Most prefer above as finished products; some will enter into joint-venture construction without assuming risk.)	Great Britain Netherlands Canada Switzerland

Continued

Table 1—Continued

Type of investor	Principal motives	Type of property sought	Typical homeland
Real estate developers	Development profit Appreciation Inflation hedge	Suburban land (for subdivisions) Urban land (for apartments, shopping centers, office buildings) Recreation land	Canada Australia Great Britain
Syndicators	Cash flow Appreciation Inflation hedge	Office buildings Shopping centers Hotels Land	West Germany
Industrial companies	Manufacturing Warehousing Distribution	Industrial plants Warehouses Service stations Retail outlets	Japan West Germany Great Britain

system, 16/ names of other brokerage firms in the same network are usually offered to the client. The referring broker normally receives 1 percent of the sales price as a referral fee.

Intermediaries

Whatever foreign real estate investors' objectives are, they are likely to go through the same channels as an American citizen would, ultimately purchasing the property with the help of an established real estate broker. Before reaching the broker, however, some foreign investors make their objectives known to an "intermediary." The intermediary may be a U.S. citizen or a foreigner residing in the United States. The international, real estate, and trust departments of commercial banks, attorneys no longer in legal practice, appraisers, mortgage bankers, and real estate and stock brokers may be intermediaries. Amivest, Landauer Associates, Glausmacher, CERI, and Jones Lang Wootten are some firms that work as intermediaries for foreign investors.

Amivest, with an office in New York, is an international diversified financial organization that deals primarily with financial institutions such as pension funds and banks; requests from medium-sized foreign (European) banks may be initiated by the banks' individual customers. Upon receiving a request to locate U.S. property suitable for a client, Amivest will telephone a correspondent in the local area, who is nearly always a broker. They will ask the broker to send information on properties. Then, if the client is interested, they ask that the information be verified. Amivest will then prepare a "package" describing the property and forward it to the foreign client. If the client decides to buy, he will send an attorney to prepare for the closing. Often the client accompanies his attorney to the closing. Amivest's main fee, which is in the form of an advisory fee, is paid from the commission on the sale.

Landauer Associates, with offices in New York, Georgia, and Florida, is an established U.S. appraisal and real estate consulting firm. It represents some large foreign institutional investors. Landauer Associates will scout for the type of property desired by their foreign clients and recommend acquisitions.

Glausmacher, in Atlanta, is owned by a West German industrialist. When attempting to find property for their clients, they prefer to contact owners directly rather than engage a broker. They will package and show the property to their client and earn an investment advisory fee upon the sale. Normally, their client will visit the United States or send a personal representative.

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of Realtors, January 1978).

16/ In addition to those franchised, another 18 percent of brokerage firms participated in an intercity referral system.

The Center for European Research (CERI) in Brussels, Belgium, assists its clients who are considering U.S. real estate acquisitions by checking (1) the economic and financial analysis of the property, from the region to the strength of the tenants, and (2) the technical aspects, including property outputs for farms and ranches or a building inspection that includes its own physical attributes, plus the adequacy of auxiliary features such as accessibility and parking. Additional advice is available concerning legal safeguards.

Jones Lang Wootten is a 100-year-old firm with offices in 35 countries, some of the newer ones being in New York and Los Angeles. As a full-service real estate firm, it brokers, leases, appraises, and acts as intermediary for foreign investors. Upon receiving a request from a European client who, for example, wants to invest $10 million in an office project in Denver, Jones Lang Wootten counselors will contact a Denver broker known to them, then send someone to visit the property. The firm's compensation is in the form of fees based on time spent, plus a percentage of the sales price.

In general, then, the intermediary makes his client's investment objectives known to local real estate brokers. He visits proposed properties and the broker and submits information to his client for a decision. While serving in this capacity, the intermediary typically works for fees based on time and effort, often supplemented by a commission payable upon acquisition.

Brokers

Foreign investors who do not employ intermediaries will approach real estate brokers in the same manner as a U.S. citizen would. Wealthier investors and institutions deal with established real estate brokerage firms that are accustomed to investments of the size they seek. "Mom and Pop" types gravitate to smaller brokers. Developers want brokers with the ability to structure their ventures.

Whatever the investor's size, commercial banks, attorneys, and other real estate contacts known to the foreign investor are asked for referrals to local brokers. Frequently, the referral begins when the investor informs his local (foreign) bank of his interests. He is then referred to a domestic (U.S.) bank's international, real estate, or trust department. After some discussion of his investment objectives and the complexities of U.S. real estate, it is suggested that the client seek competent legal and tax counsel, and he may be given the names of one or more local brokers.

Real estate brokers, having received referrals from others and thereby established good client relationships, will gain additional referrals. Their primary concern in serving client needs is a commission upon a sale. Some larger realty firms also provide property management and mortgage brokerage services for a fee. Once they develop a strong client relationship, they may then approach the client themselves

rather than through the bank that introduced them. Travel back and forth to visit the client for additional business, referrals, and goodwill may ensue.

Banks

Stimulated by increased demand, many U.S. banks have recently increased the services available to foreign real estate investors. Many U.S. banks are now giving real estate investment advice. The increase in demand is due to several factors, including:

1. Convenience: The overseas branch of a U.S. bank provides walk-in convenience.
2. Referral: When a foreign person inquires at his own bank, he is likely to be referred to a U.S. bank correspondent of his own bank.
3. Tradition: Many foreign investors rely heavily on investment advice from their own banks and so may feel more confident in dealing with banks. They may not realize that U.S. banks seldom give real estate investment advice to their U.S. clients.

The banks that have expanded operations to meet the needs of foreign investors are primarily those on either coast that have had substantial international dealings. They see this as an avenue offering opportunities for them in:

1. Receipt of fees for real estate investment advice.
2. Providing additional banking services.
3. Referrals to other foreign investors.

The services offered include these:

1. Soliciting offerings from local brokers in the geographical area desired.
2. Screening the offerings to cull out those not desired.
3. Physically and financially inspecting the property.
4. Arranging legal and tax advice or providing some of that advice.
5. Arranging for or providing property management.
6. Bookkeeping and financial reporting.
7. Arranging for or providing financing.

When a commercial bank acts in a fiduciary capacity for foreign investors in U.S. real estate, it will normally keep a complete set of documents about the property, including copies of:

1. Contracts of sale
2. Deeds
3. Surveys
4. Appraisals
5. Mortgages
6. Sources of funds

When acting as property manager, a bank will retain copies of management agreements and property income and expense statements.

Stock Brokerage Firms

Stock brokerage firms, like banks, may be approached by foreign investors. It is apparent that some are aggressively seeking real estate business from both foreign and domestic clients. The reasons for this, the services provided, and the documents retained are similar to those described above for banks.

A private stock brokerage firm will have existing foreign clients who express a wish to diversify U.S. investments, while another, more active firm may send a representative to visit the chief financial officers of European insurance companies to learn their needs and develop bases for relationships. Other firms nurture established relationships with buyers overseas and buyer representatives in the United States. These buyers are approached (1) to ascertain their needs and (2) when a U.S. real estate firm knows of a deal that might interest the investor. Direct advertisement in foreign media is not a usual practice of stock brokerage firms who serve foreign real estate investors.

Often, when overseas institutional or individual clients express interest in U.S. real estate, a representative from the real estate subsidiary of the stock brokerage firm will travel overseas to discuss buyer requirements and the firm's services. Defining and meeting the needs of individual clients is done with varying degrees of enthusiasm depending upon the realty firm's perception of the profitability of these transactions. At least one firm is seeking to cut marketing costs by developing literature and on-site expertise for foreign branch office use; servicing the smaller individual investor is attempted through syndications by overseas firms and banks, and there are prospects for syndications by U.S. firms. Several firms already have a Real Estate Investment Trust and/or deal in Government National Mortgage Association securities, which interests some foreign investors.

The need for buyer inspection of properties offered for sale and the delays inherent in overseas communications were noted as factors hindering successful competition by foreign investors in the U.S. real estate market. Established U.S. representatives of major foreign institutional investors aid those institutions in their participation in the marketplace.

Although some of the real estate subsidiaries of stock brokerage firms oversee the management of properties after the sale, generally through an affiliated organization, other firms only recommend management firms; some of the firms do not become involved in subsequent management even to this extent.

A private banker will suggest a real estate investment consultant to an inquiring foreign client and will perform normal banking functions for

real estate transactions. At the other end of the continuum, at least one firm insists that investors (1) demonstrate sophisticated ability, (2) put management of their affairs into the hands of the firm, or (3) go elsewhere to invest in real estate; this practice reflects the view of some substantial firms that damage to the firm's image could result from client incompetence and consequent loss.

At least one firm that will oversee management of properties after sale is uncomfortable with the unaccustomed fiduciary nature of that function. Interestingly, another firm that has performed lengthy educational services related to real estate investment for foreign institutional investors and that does oversee property management is unwilling to offer fiduciary services to U.S. pension funds because of possible conflicts with its affiliated brokerage house.

In sum, real estate subsidiaries of some stock brokerage firms are active in placing investments for foreign as well as domestic investors. Other stock brokerage firms want little to do with foreign real estate transactions. The established personality of stock brokerage firms appears to be maintained regardless of the type of property or investor with which or whom they deal.

Savings Associations

Savings associations (savings and loan associations and mutual savings banks) are in the business of granting mortgage loans. We have been told that one Miami savings and loan association had so much Venezuelan business (in mortgages for condominium units) that it sent a representative to Caracas for the closings. Just as commercial banks have sold properties on which they foreclosed to foreign investors, so have savings and loan associations. Indeed, in the case noted above, where the savings and loan association sent a representative to Caracas, the association actually had ownership in the condominium building.

Life Insurance Companies

There is little information on the role of U.S. life insurance companies as conduits for the foreign investor. Sometimes American insurance companies that have acquired properties by default have sold to foreign investors.

Offshore Real Estate Investment Trusts

"Offshore real estate investment trusts" have complex financial structures (incorporation in Liechtenstein and offices in the Bahamas, for example). They also provide channels for certain Latin American investments in Florida shopping centers and condominiums.

Appraisers and Counselors

Foreign investors often develop relationships with independent appraisers who, for a fee, will inspect and analyze investment opportunities and give their opinion. Since the fee is not contingent upon a purchase, this provides some protection for the investor. When the appraiser/counselor has established rapport with the investor through integrity, independence, and sound advice, the appraiser/counselor may be selected as portfolio or acquisition manager for the investor.

Attorneys

A significant channel for foreign investors is the lawyer. Lawyers provide the foreign investor in real estate with guidance in many ways. Usually an attorney is involved in a real estate transaction. The foreign investor requires a lawyer for tax reasons, for advice on local regulations, and sometimes for help in arranging financing, as well as for the closing. A lawyer may even scout out properties for the foreign investor. Sometimes a lawyer will make the actual purchase on behalf of his clients, serve as trustee, or set up and act as a director of a company that makes the acquisition. There are lawyers who have developed a specialty in dealing with the specific problems of foreign investors in real estate. These persons know the appropriate tax havens, are acquainted with U.S. tax treaties, are aware of the advantages of different forms of operation to particular investors of different nationalities, and so can substantially reduce the tax burden for the foreign investor. 17/

Lawyers who specialize in real estate can save the foreign investor from costly errors related to zoning, environmental protection regulations, building codes, unscrupulous real estate operators, and so forth.

Indeed, lawyers will often redirect foreign investors to colleagues who have made foreign investment their area of expertise. Like appraisers, trusted attorneys may be retained in an acquisition or portfolio management role. Here, the attorney-client privilege may provide another layer of protection for the foreign investor who wants to remain anonymous.

Accountants

Certified public accountants (CPAs) also offer helpful information to foreign investors, especially in relation to taxes. All the large accounting firms have tax accountants who can aid the foreign investor in his entry into the U.S. market. Many will review the accounting records of property under acquisition consideration. Another service is the

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17/ Taxes affecting foreign investors in U.S. real estate are described in chapter 17; see also U.S., Department of the Treasury, Taxation of Foreign Investment in U.S. Real Estate (Washington, D.C.: Government Printing Office, 1979).

preparation of pro forma statements of property operations on the basis of assumptions given to them.

Other Professionals

Still other professionals who aid the foreign investor are insurance brokers (sometimes international, sometimes out-of-state, sometimes local firms) and advertising agencies (whose role may be that of attracting the foreign investor or serving the foreign investor-developer once the investment is made).

Other Representatives

An ill-defined category of "representatives" can be either Americans or nationals (or one-time nationals) of the country of the foreign investors. These individuals are sometimes called "agents" for the foreign investor: sometimes they are buyers and sellers (traders); sometimes they manage a money portfolio. Usually they expect a commission for bringing together the foreign investor and the property owner. Some are on salary. Another group are the speculators. They buy property, promote it, write and distribute solicitations, and induce the foreign investor to buy their property. They are principals, not brokers. Some of these set up corporations to market land. In short, there are many "middlemen."

Other Channels

One lure to the foreign investor to enter the U.S. real estate market is provided by U.S. developers. Large firms such as Arvida and General Development Corporation have sought out investors from abroad. The British-owned Taylor Woodrow Homes firm bought the land for its community from Arvida. Developers have extensive marketing networks, promotional advertising, and seminars in Europe, Latin America, Canada, and Japan to bring in foreign investors.

Seminars in Europe given by law firms and by state government agencies also familiarize foreign investors with the United States as a place for possible investments. Once the idea is planted, the other channels for investment can be pursued.

Perhaps, too, one should include under channels the airline routes connecting the United States with foreign cities. As airlines advertise vacations, as tourists enter the country, so the idea of investment is a natural consequence (real estate agents advertise in media that reach the foreign tourist).

Licensing of U.S. real estate brokers and salespersons is a matter of state law. 18/ In most states, all but those licensed are prohibited from collecting a commission on a real estate transaction. 19/ Most states provide two categories of license: broker and salesperson. The broker is required to have more experience and/or education and to pass a more comprehensive written examination. Salespersons must be sponsored by brokers.

Real estate brokers and salespersons earn fees in the form of commissions, payable only upon a transaction or upon fulfilling the terms of their listing (employment) contract. They are special agents with limited authority, who, under the law of agency, must be loyal to their principals and accountable to them for money and property. Though they are contacted by both buyers and sellers, the usual form of employment is a "listing" contract from the seller, who agrees to pay them a commission for finding a ready, willing, and able buyer.

When listing property, brokers will gather information about the property and its financing. The physical characteristics of the site (size, shape, utilities), its improvements (size, age, construction), and its neighborhood (school district, surrounding area) and the economic characteristics of its operations (taxes, utility and maintenance costs) and financing (principal, interest rate, term) will all be noted so that the broker may feel informed. Brokers will often offer advice on market value and the curing of deferred maintenance for marketability.

The "exclusive right to sell" listing is the most commonly used contract for single-family homes. It provides protection for the broker since it entitles him to a commission no matter who sells the property during the listing period. Such periods normally range from 60 to 120 days.

Owners of large properties give brokers "open" listings, whereby owners reserve the right to sell upon their own efforts without paying a commission or to sell through other brokers. Only the broker who effects the sale is eligible for a commission. Commercial property listing periods typically range from 60 to 180 days.

Rates of commission vary with the type of property, local custom, and price. The range for single-family residences is from 4 to 7 percent; for developed properties, 1 to 7 percent; and for raw land, 6 to 10 percent of the total price. In the United States, the commission paid frequently exceeds the buyer's down payment. Commission rates are negotiable; they cannot be set through price-fixing arrangements. 20/

18/ Most states require U.S. citizenship as a condition of licensing.

19/ Exceptions are made for attorneys in the conduct of their law practice, guardians, banks acting as trustees, and certain others.

20/ United States v. National Association of Real Estate Boards, 399 U.S. 485 (1950); United States v. Atlanta Real Estate Board, Civil Action 14744, 1972; United States v. Long Island Board of Realtors, Civil Action

Information Exchange Among Residential Brokers

There are about 700,000 real estate brokers and 1,300,000 salespersons licensed in the United States. 21/ Approximately 34 percent belong to the National Association of Realtors. Most deal exclusively in single-family residences, condominiums, and the like. Most brokerage firms are relatively small; few employ more than 50 salespersons. 22/ Those that are "franchised" achieve the appearance of a large firm, 23/ but in reality the franchise organization is a collection of small firms that gain membership in the franchise for an initial fee of $5,000 to $10,000. Subsequent franchise charges are typically 6 percent of the total commission income, plus flat amounts for local advertising. With effective advertising, the franchise can become a "household word," paving the way for salespersons who would otherwise be total strangers.

Most large cities have a Board of Realtors 24/ whose membership is composed of brokerage firms, brokers, and salespersons. Local Realtor Boards facilitate communication of national and state matters and also circulate local information among brokers.

One important service provided by local Realtor Boards and by private firms is that of organizing a multiple-listing system. It serves as a clearinghouse to enable brokers to share listings with other cooperating brokers who will split the commission earned from a sale. Member brokers, when they secure listings, must promptly turn them over to the multiple-listing service on a form that includes a reasonably complete description of the property. Periodically—monthly or semimonthly—a book of all listed properties is distributed to members. Nonmember brokers and the public do not have access to these books. Many multi-list services also feed the information into a central computer, accessible through remote terminals purchased or leased by member brokers for office use. This step facilitates a rapid, selective search for residences of the type desired by a purchaser.

Upon the sale of "co-op" properties, the commission is split, normally half to the listing and half to the selling broker. Each broker then

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1418, 1972 (74,068); and others.

21/ As of September 1978, there were 2,008,254 licensed to sell real estate, according to the National Association of License Law Officials, Omaha, Neb.

22/ In 1974, less than 2,000 real estate service establishments each employed more than 50; more than 323,000 establishments employed fewer than 50. (Source: Real Estate in the U.S. Economy, table 25.)

23/ Century 21, Red Carpet, Realty World, Electronic Realty Associates, International Real Estate Network, Better Homes and Gardens, and Gallery of Homes are the most prominent. According to a 1977 survey by the National Association of Realtors, 17.1 percent of brokers are affiliated with a franchise, as opposed to 8.5 percent 3 years earlier.

24/ Local real estate boards are affiliated with the National Association of Realtors, Chicago, Ill.

compensates the salesperson who accomplished the sale with a commission, normally 50 to 60 percent of what the broker received from the sale. Most arrangements give the salesperson a bigger "slice" as his dollar volume increases. Brokers prefer that their salespersons maintain the tax status of independent contractors to avoid the tax and paperwork obligations associated with employees. 25/

There are no publicly held or nationally operated residential real estate brokerage firms, 26/ and no reporting requirements exist; so there is little information on the profitability of real estate brokerage firms. A few residential salespersons earn upwards of $100,000 annually, 27/ and many brokers have high earnings. However, the industry is cyclical and characterized by high employee and business ownership turnover. Income statistics are misleading since many individuals who hold licenses are not actively engaged in the real estate business.

Information Exchange About Commercial Real Estate

Since most of their listings are "open" to other brokers, commercial real estate salespersons and brokers cannot effectively use a local multiple-listing service as residential brokers do. Many use the services of local Realtor Boards to receive national and regional economic and political information, for education and training programs, and for regular meetings. At such meetings and through newsletter-type channels, they may share information on listings and on purchaser objectives that they are trying to meet. Often, however, the sharing is in the form of a vague description, inadequate to locate the property or to identify interested purchasers. 28/ This is to prevent other brokers from "going behind their back" to deal directly with the principal.

Many commercial brokers will specialize, both geographically and as to property type. For example, some become expert in apartment complexes of more than 50 units in the northwest quadrant of a city, others in

25/ L. Randolph McGee and Carl Stich, Jr., "Real Estate Salespersons as Employees or Independent Contractors," Real Estate Review 7 (Winter 1978):83.

26/ Century 21 is publicly held and traded over the counter but is engaged in selling services to brokers, not to real estate principals. At this writing, a major stock brokerage firm and a major retailing company are reported to be interested in or negotiating to buy real estate brokerage firms.

27/ "Real Estate: Why George Babbitt Should Be Smiling in His Grave," Forbes, September 4, 1978, pp. 41-46.

28/ A notable exception to this is the American Real Estate Exchange (AMREX). This San Francisco-based company provides a national listing service for commercial real estate. It provides a stock or commodities exchange atmosphere for trading real estate. Its principal, Gerald Jackson, was recently reported to have visited Europe with over $700 million worth of U.S. farms as listings for investors to consider.

warehouses, shopping centers, land, motels, or office buildings—or in leasing. By confining their activities in this manner, they get to know all of the legal, social, economic, and political activities affecting that area, including rental rates, prices, values, principals, other brokers, market activity, financing terms and institutions, occupancy rates, zoning changes, construction costs, etc. Sophisticated commercial brokers are able to "package" an offering, with financial and market analysis acceptable to sophisticated potential purchasers.

Compensation for brokering commercial property is normally made in the same manner as to residential brokers, i.e., commission upon a sale. Except on raw land, which may earn a 10-percent commission for a broker, percentage rates are the same as or lower than those on single-family residences, but the amount per sale is normally greater. Some brokers are amenable to taking a note or part ownership in the property in lieu of cash for a commission, particularly when the seller finances the property. In cases of leasing, the commission is typically paid over the term of the lease. Most commercial brokerage firms are local and have few salespeople, with a few notable exceptions. 29/

Many firms do more than brokerage work. Some develop land or are mortgage bankers or brokers, insurance brokers, property managers, appraisers, etc.

U.S. Brokers and Foreign Investors

Few U.S. brokers specialize only in foreign investors. "Hence," as Anthony Downs has observed, "there is a fertile field for the invention of new institutions serving their interests." 30/

Though there are over 2 million licensed real estate salespersons and brokers in the United States, not all are active. Most of the active licensees deal only in residences. In each major city of the United States, there are only a few firms engaged in commercial and industrial brokerage that have the expertise to assist substantial foreign clients. Most of these are relatively large firms with considerable experience in brokering large projects. These firms are well known nationally in that segment of the real estate community because of deals they have completed. They are known by institutional investors (life insurance companies, pension funds, real estate investment trusts), banks, property users, and other brokers.

When the U.S. representative of a foreign investor learns that his client is interested in purchasing an office building in Denver, for example, the representative will call Denver brokers whom he knows. He will describe his client's needs, and the Denver brokers will respond with information on property they feel is suitable. Then the representative

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29/ Coldwell Banker and Draper Owens have offices in several states.

30/ Anthony Downs, "Growing Influx of Foreign Capital Will Boost Price," National Real Estate Investor 19 (January 1977):46, n. 1.

will visit the brokers and the properties, screening properties so that his client is finally shown only the ones that suit his investment needs. In so doing, the intermediary will give local brokers his reasons for declining some of the properties shown. They will probably discuss the needs of other clients as well. Through this critique, local brokers will better understand the investment needs of this client and other clients of the representative and will submit new listings to the representative when they feel that the property is worthy of consideration. Business relationships are developed in this manner.

Real estate brokerage firms that serve large investors are typically the larger firms with relatively large staffs, skilled in-house personnel, and relationships with top legal, tax, and real estate consultants in the area. Since they have an established reputation within the real estate community of the United States, they have contacts throughout the country. The top 150 to 200 such firms probably handle over 80 percent (in dollar volume) of foreign investments in the United States, other than single-family homes and "Mom and Pop" businesses. 31/ Most of these firms are listed in the annual directory of the National Real Estate Investor.

There are only 1,500 members of the American Chapter of the International Real Estate Federation (FIABCI), which is affiliated with the National Association of Realtors. FIABCI provides a forum for the exchange of ideas to attain certain goals, the foremost of which is to promote, defend, preserve, and, where necessary, restore private ownership of property. FIABCI holds annual conventions and publishes a directory of members. These programs may be of help to those wanting to cultivate foreign business connections.

Some examples of real estate brokerage firms that deal extensively with foreign investors may be of interest. A 45-year-old established real estate company with international dealings is Previews. It has offices in over 10 U.S. cities and in Europe, the Middle East, and the Orient. Owners list their properties with Previews—typically luxurious homes, but also ranches, farms, hotels, islands, and institutional-type buildings. Each year, Previews compiles a catalog with color photos and sends it to parties who might be interested. Banks and lawyers often act as intermediaries for foreign buyers through Previews.

In the Dallas-Fort Worth metroplex, the Henry S. Miller Company has the highest volume of commercial sales for both domestic and foreign investors. Headquartered in Dallas, the firm also has offices in Fort Worth, Houston, Austin, and San Antonio. They have informal arrangements with independent agents in Brussels and Frankfurt who refer clients to them in Texas. In addition, other business connections are established through European, New York, and Chicago banks and by investment counselors serving as intermediaries of foreign investors. This firm brokered the sale of Pennzoil Place in Houston. It is also engaged in the sale

31/ This is based on the author's own observations and has not been documented.

of a $20-million hotel in Houston to Air France. Still, foreign investment accounts for a relatively small share of its volume.

Lehndorff, in Dallas, specializes in foreign investment. It represents wealthy German clients. For its clients, Lehndorff organizes corporations and limited partnerships to invest in farms and income-producing real estate. The investors have little or no voice in acquisition selection or property management. The principals of Lehndorff are German; they secure equity capital through personal contacts. Lehndorff also provides on-site property management.

An exclusive newspaper interview described Ed Yager as "Fort Worth's acknowledged dean in the field of foreign investment." In the article, Mr. Yager described how "intermedia" (sic) who are well trusted by investors keep a low profile. They contact him and describe the type of property they seek. He then searches for the right property throughout the state and meets with the "intermedia" with full property information at his fingertips. 32/

Underwood Neuhaus, a Houston-based stock brokerage firm with a real estate division, deals mainly with high-income Texans but has also had dealings with Swiss, British, Mexican, and German investors, as well as some using the Fiji Islands and Netherlands-Antilles as bases. In addition to brokering real estate, the firm has arranged joint ventures between European investors and American developers. Most foreign buyers want developed properties, but in a recent transaction a British pension fund agreed to purchase property under construction, subject to attainment of a near-normal (80 to 85 percent) occupancy rate. The pension fund also agreed to provide a letter of credit for the gap loan.

In the fall of 1976, a spokesman for Underwood Neuhaus reported a massive influx of Mexican money. 33/ The timing was nearly perfect: the Mexican peso was devalued to about half its value in U.S. currency later that year. Mexican investment in U.S. real estate has not been strong since then. Many of the firm's foreign business contacts are obtained through referrals from commercial banks. 34/

Robert McDonald of the Seattle office of Coldwell Banker noted that about 25 percent of the foreign purchases in the Seattle area were made by Europeans, with the 75-percent balance made by Canadians. Many of the Canadian investors had migrated to Vancouver from India and Africa. Some walked into the Coldwell Banker office directly, while others were referred by banks and attorneys. McDonald noted that about half of the Canadian investors were passive; the other half were more active in real estate, being developers, builders, or architects by profession.

In Atlanta, Charles Ackerman of Ackerman and Company stated in a telephone interview that his investors (including two large Rotterdam-based

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32/ Fort Worth Star-Telegram, October 5, 1978, pp. 6C, 7C.
33/ "Tougher Bargain Hunting for Foreign Investors," p. 62.
34/ Telephone interview with Mr. Shelton.

real estate investment companies) look for yield, appreciation, and an inflation hedge. When asked about secretive intermediaries, Mr. Ackerman replied that his investors are highly sophisticated, and all transactions are above-board. Those who are not of such high repute and not as sophisticated may use intermediaries and less-well-known brokers and may attempt to remain secret.

The difference between investors who are secretive and those who are not is probably due to currency restrictions in their homelands. There are only a few governments that presently let money out of their countries without restriction. European countries with unrestricted currency flow include Belgium, Luxembourg, Switzerland, West Germany, and the Netherlands. Other countries impose restrictions; some are severe, which may make open purchase of foreign real estate impossible.

Peculiarities of Foreign Investors

Brokers have acknowledged certain differences and similarities between foreign and American clients. The differences include these:

1. Method of communication: More Telex and telecopier use is required for foreign clients.

2. Language problems: Though the United States and Great Britain share a language and use the same real estate terms, confusion is created by some terms that have different meanings in the two countries. Naturally, it is even more difficult to communicate with investors who speak an entirely foreign language.

3. Nontransferability of expertise: Even investors who are knowledgeable about European, Asian, or Middle Eastern practices in real estate cannot easily transfer their expertise to the United States. Income taxation, financing methods, accounting practices, and the like are quite different in the United States from what is customary elsewhere. Consequently, even a knowledgeable foreign investor can become confused when presented with a U.S. real estate offering.

4. Concern over management: A foreign investor, knowing that he is an absentee owner, is likely to be worried that his property will be poorly managed.

5. Financing differences: Foreign investors prefer less leverage than their American counterparts. They prefer more equity and will often purchase without the aid of financing.

6. Secrecy: Some foreign investors prefer secrecy in the handling of their investments, but this is not necessarily because of illegality. Secrecy may be desired because, in an age of kidnapping, the foreign investor does not want to advertise his wealth. He may also not want to display his wealth if it will make him vulnerable to expropriation or higher taxes in his homeland. Secrecy may be desired because the

foreign investor feels that his taking money out of his homeland may be regarded by his compatriots as unpatriotic and so may jeopardize his own position at home. Another reason is tradition: he may not have been required to disclose investments in the past, and so he does not want them disclosed now.

Foreign Investor Similarities

Similarities between U.S. and foreign investors include these:

1. Caution: Like their U.S. counterparts, foreign investors are careful buyers. They want to buy good property at or below fair market value.

2. Knowledgeability: They make an effort to inform themselves about the property and its surroundings.

3. Assistance: They enlist the aid of professionals, including attorneys, appraisers, and brokers.

4. Diversity: Foreign investors, like their U.S. counterparts, are all different, with various goals, objectives, and investment limits.

5. Secrecy: Brokers will attempt to prevent other brokers from learning the identity of the principals with whom they deal. They want to remain the sole broker for the client; so they surround their activity with secrecy to ward off other brokers. In reality, the principal may not care whether his name is divulged; it is the broker who shrouds his foreign client with a "veil of secrecy."

The Broker's Relationship with Foreign Investors

Judging from interviews with brokers, the relationship of a U.S. broker to his foreign clients is little different from his relationship with his U.S. clients. The broker wants to "control" the client by excluding other brokers, at least in the geographical district he serves. He wants to properly fill the client's needs in order to gain repeat business and referrals. The behavior of a foreign investor and the broker who serves him blend into the U.S. market, losing a separate identity.

After a broker has served a foreign investor, his reputation for doing so may spread on both continents. With some publicity about a very important deal, even one that was never closed, or as the result of small talk, especially at business meetings, the broker is likely to receive correspondence from principals wanting to buy or sell or other brokers attempting to fill client needs. Upon achieving this level of success, brokers can indeed serve their clients better. Because of their elevated status, particularly in the minds of other brokers, they can get "first pick" of property when it goes on the market, have access to more listings, and get repeat business from the foreign client and his associates.

To achieve this goal, the broker is likely to be cooperative with the press (unless his client requests anonymity), in order to get the greatest possible mileage out of each transaction. To be quoted in Business Week, Newsweek, Time, Forbes, or the National Real Estate Investor or to testify before a Senate subcommittee means public exposure that may serve no other goal than to help promote the broker's business.

Property Information Sought by Foreign Investors

Foreign investors may seek information on properties directly. Some foreign investors are gullible—ingenuously buying swamp land, listening naively to promoters' promises, and doing little in the way of feasibility analysis. Many such investors have been cheated. Many have overpaid. These have not known how to obtain independent appraisals or to make systematic evaluations. At the other extreme, certain foreign investors are highly sophisticated and ask questions that provide them with information on discounted rates of return, for example.

Foreign investors can be naive about zoning and environmental regulations and, as a result, make poor investments. Again, at the opposite pole, other foreign investors will have close contacts with local banks, lawyers, and government officials and will carefully work out the costs as well as the benefits of proposed investments. Some will have intelligent advisers who urge them to "shop around," who can evaluate zoning rules (present and proposed or expected), and who will help the foreign investor avoid pitfalls.

Foreign investors who deal through U.S. brokers are provided with information about the property and its surroundings. As stated earlier, some investors want property of specific types (e.g., cattle ranches, motels, shopping centers, or land suitable for development). Many have geographic preferences. Those who do are able to narrow their search, contacting brokers only in the specific area or region desired.

Depending upon the types of property being sought and the level of information desired, the following types of information may be used by the investor, his advisor, and his broker: 35/

1. Population: size, household/family distribution, age distribution, sex distribution, natural increase, in-migration (or out-migration), education, ethnic/racial background, labor force participation, geographic density/distribution.

2. Climate: precipitation, temperature, prevailing winds.

3. Area: expansion/annexation, size, developed/undeveloped land.

35/ Society of Real Estate Appraisers, An Introduction to Appraising Real Property (Chicago: Society of Real Estate Appraisers, 1975).

4. Topography: land suitable for building, gradients, drainage.

5. Soil and subsoil: bearing capacities, permeability/percolation, ground water, drainage, land suitable for building, agricultural productivity.

6. Employment: number, unemployment, job skills, industrial distribution, stability.

7. Economic base: industrial mix, size mix of firms, stability, sensitivity to external influence, retail trade, wholesale trade, service trade, basic orientation, productivity.

8. Income: area total, per capita, per household/family, disposable income; expenditure patterns, sources of income, stability, wage rates, hours worked (dependence on overtime), savings.

9. Prices: general price levels (purchasing power), cost of living, construction costs, housing prices (by type), rentals (by type).

10. Interest rates and financing: pattern of rates, mortgage loan rates (by type), FHA and VA rates, FNMA prices, savings account rates, availability of mortgage loan funds, mortgage loans (by type), foreclosures.

11. Taxes: income and sales taxes (relation to disposable income), property tax rates, assessment ratios and policies, tax burden (as percentage of value/price), government budgets.

12. Housing supply: standing stock (by type and price/rental range), vacancies (by type and price/rental range), new construction (by type and price/rental range), conversions, demolitions, turnover.

13. Utilities: size or capacity, coverage, type (water, sewer, gas, electricity, telephone; public/private), rates.

14. Municipal services: protection (fire, police), education, recreation, controls (planning, zoning, subdivision regulations, codes), enforcement policies, refuse collection and disposal, streets and roads (types, sizes, distribution), insurance ratings and rates.

15. Buyer attitudes: housing tastes and standards, reputation of area.

16. Transportation: public systems (capacities and costs), highway network (capacities, construction), traffic volume, congestion, parking facilities (capacities and rates), travel/commutation times and costs.

17. Occupancy: ownership/rental, vacancy.

Some of the leading sources of information are publications, some of which are listed here: 36/

1. Census of Population, Bureau of the Census, U.S. Department of Commerce.

2. Census of Housing, Bureau of the Census, U.S. Department of Commerce.

3. Survey of Current Business (monthly), U.S. Department of Commerce.

4. Economic Indicators (monthly), Council of Economic Advisors, Office of the President.

5. Building Permits Issued (monthly), U.S. Department of Commerce.

6. Value of Construction Put in Place (monthly), U.S. Department of Commerce.

7. Statistical Abstract of the United States (annual), U.S. Department of Commerce.

8. Housing Statistics (monthly), Department of Housing and Urban Development.

9. Mortgage Recordings Under $35,000 (monthly), Federal Savings and Loan Insurance Corporation.

10. Urban Housing Market Analysis, Federal Housing Administration.

11. Economic Development (monthly), Economic Development Administration, U.S. Department of Commerce.

12. Construction Review (monthly), Office of Business Economics, U.S. Department of Commerce.

13. Census of Manufacturing, Bureau of the Census, U.S. Department of Commerce.

14. Census of Business: Retail Trade; Selected Services; Wholesale Trade (Area Statistics), Bureau of the Census, U.S. Department of Commerce.

15. City and County Data Book, Bureau of the Census, U.S. Department of Commerce.

16. Mortgage Recording Letter (monthly), Federal Home Loan Bank Board.

17. Real Estate Market (quarterly), National Association of Realtors.

18. Mortgage Market (quarterly), National Association of Realtors.

19. Federal Reserve Bulletin (monthly), Board of Governors, Federal Reserve System.

36/ Ibid.

20. Neighborhood Standards, Federal Housing Administration (by state).

21. Personal Income: A Key to Small Area Market Analysis, U.S. Department of Commerce.

22. Sanborn Buying Power Maps, Sanborn Map Company.

23. Sales Management Survey of Buying Power (annual), Sales Management, Inc.

24. Midwest Housing Markets, Advance Mortgage Corporation (Detroit).

25. The Community Builders Handbook, Urban Land Institute.

26. Census Data for Local Communities: Population, Housing, Manufacturing, Business, Bureau of the Census, U.S. Department of Commerce.

27. Building Costs (monthly), E. H. Boeckh and Associates.

28. Dow Building Cost Calculator and Valuation Guide, F. W. Dodge Corporation.

29. Residential Cost Handbook, Marshall and Stevens Company.

30. Regional and Local Surveys of Vacancies, U.S. Postal Service.

31. Regional and Local Market Analyses, Federal Housing Administration.

32. Published economic base studies and research reports from universities, consulting firms, and local agencies.

33. Planning, redevelopment, and zoning studies published by local agencies.

Information that is available from public records includes: 37/

1. Deed recordings.
2. Mortgage recordings (or deeds of trust).
3. Foreclosures.
4. Building permits.
5. Local regulations: planning, zoning, subdivision, housing codes, fire codes, building codes, etc.
6. Taxes, assessments, tax rates.
7. Public housing units, rentals, vacancies.
8. Zoning maps, exceptions, and variances.

Private sources that often gather and publish real estate or related information include the following: 38/

1. Chambers of Commerce.
2. Local or area colleges and universities (research studies).
3. Brokers and appraisers.
4. Consultants for public and private development groups.

37/ Ibid.
38/ Ibid.

5. Banks and savings institutions.
6. Title and title insurance companies.
7. Public utility companies.
8. The National Association of Home Builders and local home builders associations.

In addition to the sources of information cited above, there are over 100 periodicals covering real estate and related topics and thousands of books on real estate matters.

Listings of single-family homes that are held by real estate brokers include basic information about the number of rooms, type of heating and cooling system, age, financing, price, and a few other items. A photograph is usually available as well. Region and area information, including facts about schools, churches, industry, cultural opportunities, and climate is often given in a "newcomer's package" offered by brokers or banks to new clients. Presentation of each home is complete in person.

For income-producing property, few brokers prepare more than a one- or two-page circular. This gives pro forma operating figures, including rental rates, vacancy figures, and operating expenses by category (e.g., ad valorem taxes, hazard insurance, utilities). For shopping centers and many office buildings, tenants are listed, along with the rental rate of each, lease expiration date, and features of netness (expenses to be paid by the tenant) or escalation provisions of the lease. The description of improvements is brief, as is the area and neighborhood analysis.

Not all of the information desired by foreign investors is provided by local brokers. The information is of the same type as a sophisticated out-of-town U.S. investor would want. It is normally supplied to potential construction and permanent lenders upon the conception of large projects, in the form of a "feasibility study." Such studies are typically prepared by counselors, appraisers, or commercial mortgage bankers. Their contents include:

1. Region analysis—
   a. Predominant economic activity (industrial, agricultural, commercial, government).
   b. Economic trends (population, employment).
   c. Political climate (growth encouragement, stability).

2. Neighborhood analysis—
   a. Population, business, employment, and economic conditions.
   b. Public services, facilities, amenities, and zoning and other regulations.
   c. Inventory of competition.
   d. Rents, occupancy, and tenant turnover.
   e. Condition and appearance of the neighborhood.
   f. Possible and likely new construction.
   g. Trends and consumer acceptance.
   h. Political climate.

i. Environmental considerations.
j. Schools, churches, and recreational facilities.
k. Transportation.

3. Analysis of competition—
   a. Location (neighborhood, accessibility, prestige, aesthetics).
   b. Age (chronological, effective life, remaining useful life).
   c. Rents (market level of segments, sensitivity to change, concessions).
   d. Occupancy (rate of various segments of market, forecast change, space available).
   e. Size (inventory of competition).
   f. Amenities (offered or needed).
   g. Condition (needed repairs or improvements).

4. Acceptability of the project under consideration—
   a. Social (desirability, acceptability).
   b. Financial (rent, operating expenses, debt service, cost, terms).
   c. Political-governmental (zoning, schools, utilities, police and fire protection, taxes).
   d. Physical (attractiveness, size, age, condition).

Property Data Analysis

Some foreign investors, because they (1) lack familiarity with the local market or (2) need consent from their principal or (3) need more time to evaluate alternative investments, will seek to tie up property for months. They use options or contracts with modest amounts of money. If the time is granted, it is used to study the market and the particular property being considered. It gives an intermediary time to convey information to his principal. U.S. owners and banks both dislike such a time delay. Once a property is on the market, a rapid decision is preferred. Sellers may have alternative investment opportunities or personal or tax reasons for desiring a quick sale. It is not unusual for the seller to deny requests for time delays. Sellers may either (1) include in such contracts a notification clause whereby, once notified, the prospective purchaser has a limited amount of time to close or (2) reject outright contracts calling for lengthy time delays. Foreign investors seeking time delays may become perturbed when the seller refuses such requests or sells the property to another party.

Other foreign investors can move much more rapidly and consummate a sale more quickly than U.S. investors. Such foreigners may visit the United States on a 60-day tourist visa and move rapidly to acquire a business if that is their intent. They prefer to buy in cities where they have friends or relatives, which limits their choice. They often pay premium prices for the properties they acquire because of (1) the limited amount of property available in the desired location and (2) the time pressure involved.

Sophisticated foreign investors, particularly British and Canadian developers, are likely to be just as familiar with the United States and the

regions in which they concentrate as their U.S. counterparts. They have done their research on a city and/or its suburbs and can seek out the right property. Several foreign developers and investors have more impressive financial statements than their U.S. counterparts, too, so that arranging financing or paying entirely in cash is no problem. It is not unusual for them to purchase property while an American developer or investor is still contemplating acquisition. In this case, it is the American who becomes put out with the foreign investor because he has missed out on a good opportunity.

When foreign investors act rapidly, it is not necessarily recklessly. Contingency, or "subject to," clauses will be included in the contract. In the case of farmland, such clauses may be few and related only to land irrigation and fertility tests. For development property, on the other hand, the clauses may be more extensive and include rezoning requirements, soil-boring tests, investigation of environmental matters, and the like. Contract provisions on improved property may require physical inspection for structural soundness and an audit of occupancy levels, rental rates, and operating expenses. But these contingency or "subject to" clauses are no different from those that an American investor would include. Title companies, attorneys, lenders, appraisers, counselors, and others may be engaged to resolve the contingency clauses so that the transaction can be closed.

Closing

"Closing" or "settlement" is the time when money and property are to be transferred. Local attorneys are employed by foreign investors, though arrangements for their services may be initiated by the broker or intermediary. A title insurance policy is the most commonly used method of protecting against title defects.

In the United States, an attorney, abstractor, or title insurer is engaged to report on the marketability or insurability of a title to real estate. On the basis of his examination of public records and his report or opinion, a title insurance company will issue a title policy. Most title insurance contracts are on a standard form approved by the state of issuance and by the American Land Title Association (ALTA). The standard form contains a requirement for the disclosure of the owner's nationality. 39/ However, foreign investors who seek anonymity can use a domestic corporation or an American citizen serving as trustee to comply with requirements and still avoid public disclosure.

39/ Standard ALTA policy, 1970.

MORTGAGE LENDING IN
THE UNITED STATES

At the end of 1977, over $1 trillion in mortgages was held by lenders, as shown in table 2. The most important institutional real estate lenders are the following:

Institutions	Number	Mortgage loans (Billions)
Savings and loan associations	5,000	$381
Commercial banks	14,000	177
Life insurance companies	1,700	96
Mutual savings banks	500	88
Mortgage investment trusts	200	20
Mortgage companies	1,500	15

As shown in table 3, savings and loan associations dominate the financing of one- to four-family homes, providing about 48 percent of such loans. Most of their assets are invested in such property. Commercial banks supply about 15 percent of the total loans on such property. Federally supported agencies, included in table 3 under "all others," supply another 15 percent of the loans on one- to four-family dwellings and mutual savings banks about 9 percent.

Savings and loan associations, life insurance companies, commercial banks, mutual savings banks, and others, including pension funds, have been the most active in financing multifamily dwellings.

As for commercial properties, commercial banks have provided more than any other single type of institution. Unlike other major institutions, commercial banks fund construction loans on commercial property, which are retired upon completion of construction, using funds loaned by life insurance companies and savings and loan associations. Though nearly $400 billion of commercial property was funded by savings and loans as of the end of 1977, this represented only 10 percent of their total mortgage loans. Life insurance companies, though they are more heavily engaged in commercial property permanent financing than single-family home financing, had less than 28 percent of their assets invested in mortgage loans at the end of 1977. 40/

40/ The preceding section draws heavily upon the Savings and Loan '78 Fact Book.

Table 2—Mortgage loans outstanding, by type of property (billions of dollars)

Year-end	Residential properties: One- to four-family	Residential properties: Multi-family	Residential properties: Total	Commercial properties	Farm properties	All properties
1950	45.2	9.3	54.5	12.5	6.1	73.0
1955	88.2	13.5	101.7	19.3	9.0	130.1
1960	141.9	20.8	162.7	33.4	12.8	208.9
1965	220.5	38.2	258.7	55.5	21.2	335.3
1966	232.9	41.3	274.2	61.2	23.1	358.4
1967	247.2	44.8	292.0	65.8	25.0	382.9
1968	264.6	48.3	312.9	72.5	27.2	412.5
1969	282.7	53.2	335.9	78.4	29.0	443.2
1970	297.7	60.1	357.8	85.5	29.8	473.1
1971	328.3	70.1	398.4	95.9	32.2	526.5
1972	372.2	82.8	455.0	112.7	35.8	603.4
1973	416.2	93.1	509.3	131.7	41.3	682.3
1974	449.4	100.0	549.3	146.9	46.3	742.5
1975	490.8	100.6	591.4	159.3	50.9	801.5
1976	556.3	104.3	660.6	171.4	57.1	889.1
1977*	649.4	111.2	760.6	192.3	65.8	1,018.8

Source: Federal Reserve Board.
Note: Components may not add to totals because of rounding.
*Preliminary.

Table 3—Mortgage loans outstanding, by type of lender and type of property, year-end 1977*
(Billions of dollars)

Lender	Residential properties			Commercial properties	Farm properties	Total mortgage loans
	One- to four-family	Multi-family	Total			
Savings and loan associations	308.4	33.3	341.7	39.5	†	381.2
Commercial banks	101.4	8.7	110.1	58.7	7.9	176.7
Mutual savings banks	57.6	15.3	72.9	15.1	0.1	88.1
Life insurance companies	14.7	18.9	33.6	53.5	8.6	95.7
All others	167.3	35.0	202.3	25.5	49.2	277.1
Total	649.4	111.2	760.6	192.3	65.8	1,018.8

Sources: Federal Home Loan Bank Board; Federal Reserve Board.
Note: Components may not add to totals because of rounding.
*Preliminary.
†Less than $50 million.

Reasons for Financing

Most real estate transactions involve the use of borrowed funds in the form of a mortgage loan. Many purchasers could not afford to pay all in cash, and those that can also recognize the advantages of borrowing funds, including portfolio diversification, income tax benefits, and financial leverage.

Portfolio diversification allows risk to be spread over a variety of properties so that, if any one fails to achieve the expected results, it will not have so great an impact on the total funds invested. Diversification may be based on property type and/or geographical distribution.

The income tax advantages of borrowing funds are that (1) interest is fully deductible on property used in a trade or business, and (2) depreciation is allowed on the entire depreciable asset even though the allowable depreciation may exceed the equity contribution.

Financial leverage, the use of borrowed funds, allows an owner to control more property. Provided that the property purchased yields benefits at a rate that exceeds the interest rate on the borrowed funds, the owner enhances the returns on his cash investment.

The investment strategy of many U.S. investors is to borrow as much as possible. By minimizing their down payment, they stand to maximize returns on their equity. Most investors recognize the financial risk associated with highly levered (large-debt) property. A small decline in property value and/or income can result in a default and foreclosure. Knowledgeable investors therefore seek nonrecourse financing, which confines their liability to the mortgaged property. Nonrecourse financing also allows tax losses to be used by limited partners in real estate, even when tax losses are in excess of the equity that they have contributed.

Use of Financing by Foreign Investors

It has often been assumed that foreign investors are so flush with funds that they always pay in cash only. There have indeed been some extraordinary cash outlays by such investors. On the other hand, most foreign investment in real estate appears to be financed—and mainly through U.S. sources. The foreign investor seems to use the same sources of financing as his U.S. counterpart, except on occasions when he (or his company) may have wider opportunities to tap international money markets.

It has been observed, however, that foreign investors, with the exception of some sophisticated Canadian developers, prefer to use much less leverage than the typical U.S. investor. Several reasons why a foreign investor does not employ as much credit in real estate transactions are:

1. The degree of leverage and the favorable terms available in the United States are unavailable in his homeland; so he is not accustomed to them.

2. He sees his U.S. investment as a form of financial security and does not want to jeopardize that security in any way.

3. He sees that the interest rate on borrowed funds is in excess of the current return on total capital (negative leverage); so returns are enhanced by not borrowing. He may, however, assume an existing low-interest-rate mortgage.

4. He believes that borrowing against property is a last recourse; this is analogous to the attitude of most middle-class Americans toward using a pawn shop.

5. He is unwilling or unable to withstand the credit check that lenders would impose.

When money is tight, real estate financing is particularly difficult to arrange. Institutional lenders may be inundated with loan application submissions from developers, real estate brokers, and mortgage brokers or bankers. In this situation, lenders do not have time to read or inspect all of the requests. They will consider only (1) those with whom they have had prior favorable business dealings and (2) others with types of investment that they desire at that time (e.g., shopping centers or office buildings) and at geographic locations that they want (i.e., specific cities). Submissions by a well known mortgage banker that include appraisals by nationally known firms or highly reputable appraisers are more likely to gain the attention of an institutional lender. Since the permanent financing of large projects normally includes exculpation (the property serves as the sole collateral for the loan), actual ownership is not as important as the property itself, leases, and management.

Foreign investors, then, if they want to arrange new financing, will go through the same channels as a U.S. investor or developer. Their loan applications are processed in the same manner as any domestic application, though references may include foreign banks and/or other foreign sources. One is struck, however, by how ordinary the financing mechanism seems. Some of the financing is local, some national (the Saudi Arabian purchase for $49.1 million of a Miami office building was financed by a $30 million mortgage from the First National Bank of Chicago). Some Canadian developers use local financing; others resort to Canadian institutions, such as the Bank of Montreal; often they use both.

Just as American home buyers get mortgages from a local savings and loan association, so too, in the Miami area, for instance, Venezuelans, Ecuadorians, Bolivians, Colombians, and so forth have obtained such loans. Likewise, just as large U.S. investors might bring in insurance companies to aid in financing, so do foreign investors. For example, the Miami Free Zone Corporation (controlled by Colombian investors) obtained a $10-million, 15-year permanent mortgage from Metropolitan Life Insurance

Company. It was used to pay off a $10-million construction loan from First Boston Mortgage Company.

Commercial banks are active in providing construction funds to foreign developers. The mortgage banker or mortgage broker can assist the foreign investor in arranging these as well as permanent mortgages.

Since there have been at least 5 years of high-volume foreign investment in U.S. real estate, foreigners are often selling as well as buying. The sales may involve the seller in taking a second, third, or fourth mortgage. Accordingly, the foreign seller moves from an equity position to that of a lender.

In sum, financing for foreign investment in U.S. real estate can come from traditional local sources or from sources elsewhere in the United States. The foreign investor may have access to foreign sources of capital, especially from his home country. In addition, financing can come from third-country sources and Euro-dollar markets.

SOURCES OF INFORMATION ABOUT FOREIGN INVESTMENT IN U.S. REAL ESTATE

Real Estate Brokers

While real estate brokerage firms exchange information with one another across the country, they are especially careful to protect themselves. They exercise caution as to whom they inform about property and clients, to minimize the likelihood that competing brokers will go directly to the property owner or prospective purchaser instead of dealing through them. Therefore, it is highly unlikely that the established, well known U.S. brokers would voluntarily supply information to a central pool about foreign investors or the properties they own. They would be delighted to take advantage of information contributed by others, but not if it would require disclosure of all of their files. Even if the information were to be kept confidential within an agency of the U.S. government, brokers might still not contribute voluntarily. Few are staffed for or accustomed to dealing with many government regulations. (An example: Brokers maintain their sales forces as independent contractors rather than as employees to minimize regulatory requirements.) Many might fear that leaks of information would damage their business.

If a law were passed requiring brokers to register closed real estate transactions of foreign clients, compliance would probably be high. However, the broker is not always aware of who the ultimate purchaser is; so accuracy would be questionable. As more thorough information was sought from brokers, and as that information reached prospective clients and unconsummated transactions, compliance would likely decline.

Real Estate Appraisers

Real estate appraisals are sought for numerous purposes, including: 41/

1. Purchase, sale, or exchange of property.
2. Fire insurance or hazard underwriting.
3. Valuation for utility rate determination.
4. Investment or mortgage loan security.
5. Inheritance or property tax or assessments.
6. Inventory or accrued depreciation.
7. Equity appraising or financing.

Appraisals of real estate may be performed for any of the above purposes, whether the property is owned by foreign or domestic investors.

Appraisal organizations in the United States include the following:

Organization	Location
American Institute of Real Estate Appraisers	Chicago, Ill.
American Right of Way Association	Los Angeles, Calif.
American Society of Appraisers	Washington, D.C.
American Society of Farm Managers and Rural Appraisers	Denver, Colo.
Society of Real Estate Appraisers	Chicago, Ill.
National Association of Review Appraisers	Minneapolis, Minn.
New York State Society of Real Estate Appraisers	Albany, N.Y.

The two foremost professional organizations in real estate appraisal are (1) the American Institute of Real Estate Appraisers, which offers the MAI (Member of the American Institute) and RM (Residential Member) designations, and (2) the Society of Real Estate Appraisers, which offers the SREA (Senior Real Estate Analyst), SRPA (Senior Real Property Analyst), and SRA (Senior Residential Analyst) designations. Each of these two organizations has approximately 5,000 professional members, though there is substantial cross-membership. Many of the members are not available for independent fee assignments. Designation in either organization requires (1) completion of educational requirements, including examination, (2) completion of acceptable demonstration appraisal reports, and (3) a period of apprenticeship. The RM and SRA designations are for those engaged in residential work. The MAI, SRPA, and SREA designations require additional qualifications on the part of the applicant and are for those who do more than residential work.

Appraisals are nearly always required by third-party lenders before they commit to loans secured by real estate. So, whenever an investor, foreign or domestic, seeks a mortgage loan, an appraisal will be completed.

41/ Alfred A. Ring, The Valuation of Real Estate (Englewood Cliffs, N.J.: Prentice-Hall, 1970), p. 348.

Foreign and U.S. purchasers may seek appraisals even though one is not required by a third party. Purchase contract conditions may require an appraisal and give the buyer the opportunity to back out or negotiate a lower price if the appraised market value is less than the sales price.

Real estate appraisers are highly cooperative in sharing information with one another, both locally and nationally. They maintain records of transactions and call both buyers and sellers to verify prices, terms, dates, and property sold, for the purpose of using these sales as "comparables" when estimating the market value of similar properties being appraised. They submit this information to a central pool, e.g., the Market Data Center, which is open to members of the Society of Real Estate Appraisers.

However, appraisers could not provide a complete or accurate account of foreign investment in U.S. real estate, for two reasons. First, there is not necessarily an appraisal involved in every transaction. Second, the appraiser does not necessarily know the name or nationality of the principals to the transaction since appraisal requests may come from lenders, trustees, or friends of the principals.

Counselors

Though there are numerous persons who may call themselves "real estate counselors," only one group, the American Society of Real Estate Counselors (Chicago, Ill.), offers a professional designation, CRE (Counselor of Real Estate). There are fewer than 500 members of this invitation-only organization. Many members also hold MAI, SRPA, or SREA designations, and they are considered the elite from those ranks. They are called upon not necessarily to appraise for market-value purposes, but sometimes to offer opinions as to expected trends in property value, alternative financing packages, investment suitability, alternative-land-use proposals, and other such matters. They are used by both foreign and U.S. investors.

Many of these counselors are contributors to professional journals, attend national conventions and local meetings with regularity, teach in and hold offices in various professional organizations, and are engaged in consulting work on large projects with out-of-town participants. Because of this wide exposure, most of the members are known to each other. Despite wide geographical dispersion, it could be said that they form a network of expert personnel. These counselors could provide a great deal of information about ownership, particularly of important parcels of real estate, including foreign interests in them and the names of those who broker for foreign investors. However, they could not supply complete information on foreign investment in U.S. real estate for the same reasons as those advanced for appraisers.

Lending Institutions

Attempting to monitor the extent of foreign investment in U.S. real estate by inquiry of lending institutions would provide incomplete data for the following reasons:

1. Many foreign investors pay entirely in cash.
2. Many foreign investors assume existing mortgages without revealing their identity.
3. It is possible for foreign investors to arrange financing without revealing ultimate ownership and their country of origin.
4. The financing may be provided by sources outside the United States.

Property Managers

Property managers are a necessity for any absentee owner, including a foreign investor. Some real estate brokerage firms have a property management division that provides regular income for the firm, in contrast to the sporadic income provided by brokerage commissions. The Institute of Real Estate Management (IREM), an affiliate of the National Association of Realtors, has about 4,000 members. It offers the Certified Property Manager (CPM) designation to those who meet its requirements. Most of the largest and best known property management firms have at least one individual with this designation to supervise those who are regularly at the property site.

Contracts with property managers provide compensation based on the gross income generated by the property; the rate of this commission is usually in the range of 4 to 7 percent of the gross. Property management companies may specialize in shopping centers, office buildings, or apartments. Though responsibilities differ among firms, their services usually include:

1. Periodic surveys of competition to determine competitive rentals and services.
2. Timely deposits of rental receipts and payment of invoices.
3. Accounting reports at regular intervals.
4. Suggestions on rental rates, adequacy of insurance, necessary maintenance and repairs, and arranging property tax protests.
5. Lease renegotiation.

Property management companies may hold a great deal of information about local rental rates, vacancies, and operating expenses. They or independent researchers may provide aggregate information that is published by local newspapers. But the rental income, vacancy rate, and operating expenses of a specific building are maintained in confidence. The property manager and/or his client would be concerned about a disclosure of such information. If details were announced, they might invite (1) new construction as competition, (2) increased tax assessments, and/or (3) more difficult lease negotiations. Poor building performance can put a tenant into a stronger bargaining position.

Since foreign-owned real estate may be held in the name of a U.S. trustee, and since trustees may be given authority to select a local property manager, the property manager may not know the identity of the ultimate owner. Consequently, some information about foreign ownership could be gleaned by surveying property managers, but it would not be complete.

Tax Assessors and Collectors

The main professional organization to which tax assessors belong is the International Association of Assessing Officers (headquartered in Chicago). This association has approximately 9,000 professional members. But there are well over 13,000 separate assessing districts in the United States, each with at least one tax assessor.

Deed recorders in each county notify county tax collectors of recorded ownership changes. Consequently, tax assessment/collection rolls are a source of ownership information. However, the tax assessor is concerned mainly with property valuation, the collector with assuring that taxes are paid. Since foreign investors often have U.S. representatives (banks, trustees, attorneys) to pay their ad valorem tax bills or use domestic corporations as a vehicle for purchasing real estate, assessment records are not a good source of information on the extent of foreign investment in U.S. real estate. Furthermore, in most states, recorded documents fail to indicate the actual purchase price. Assessed values do not necessarily reflect the fair market value of property because of (1) the time lag in updating assessment rolls, (2) the lack of thoroughness of tax appraisals, and (3) the desire of some local jurisdictions to show low values in order to receive more state support.

There is often publicity about changes in the ownership of important properties. However, public announcements are likely to understate the price of the property, so that the actual amount paid is not known to the assessor.

Records of Ownership

Records of real estate ownership are maintained in each county. Though an owner need not record the deed he receives, recordation gives the world constructive notice of ownership, thus providing protection. But the system used fails to provide any way to monitor the extent of foreign investment. Records are kept either by an assigned parcel number or by the names of the seller and purchaser. Foreign-owned U.S. real estate may be in the name of a U.S. trustee, U.S. corporation, or other entity that fails to disclose ultimate ownership. Many states have restrictions on and/or prohibitions of foreign ownership. 42/ Difficulty in gathering

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42/ U.S., Department of Agriculture, Economic Research Service, State and Federal Legal Regulation of Corporate Land Ownership and Farm Operation, by F. Morrison and K. Krause, Agricultural Economic Report No. 284 (Washington, D.C.: Government Printing Office, 1975).

information has been observed. 43/ Authorities have reported that attempting to determine foreign ownership of U.S. real estate anywhere except in Iowa, which has special registration requirements for nonurban land, is "a well-nigh insuperable task." 44/

SUMMARY

Foreign investors are participants in the huge real estate industry. These investors come from all over the world, have different reasons for investing in U.S. real estate, and seek different types of property.

Those investing the most money come from Western Europe, Canada, and Great Britain. They feel that U.S. real estate investments provide protection from (1) political turmoil in their homeland and (2) inflation.

The real estate may provide other benefits as well, principally in the form of appreciation and cash flow. The deterioration of dollars in the world currency market has made U.S. real estate more attractive to those foreigners who hold strong currencies.

Some investors want small motels, while others prefer shopping centers, farms, ranches, subdivision land, timber land, office buildings, or apartments. They are business people, wealthy individuals, institutional investors, developers, or syndicators. Many pay all in cash for their purchases; others assume existing loans or arrange new financing. Some will accept a great deal of risk; others are cautious. Some are sophisticated buyers, others careless; some have invested wisely, others been duped. Some beat their breasts in announcing their arrival; others are unobtrusive; still others desire anonymity and have successfully concealed ownership.

Foreign investors are presently buying U.S. real estate. Their activities contribute to the higher prices paid for some properties, but they are not establishing the higher prices—they are just a part of the U.S. real estate market.

Magazine articles occasionally refer to clandestine meetings at which a foreign investor casually leaves a suitcase full of money to be picked up by a real estate broker for investment in U.S. real estate. It is quite possible that such transactions have occurred; as expected, none could be documented. Perhaps a few U.S. citizens also transact business in this fashion.

The activity of the majority of foreign investors, however, blends into the U.S. market. The investors, their employees, or other representatives contact U.S. brokers, who sell property to them. If an appraisal

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43/ U.S., General Accounting Office, Foreign Ownership of U.S. Land: Much Concern, Little Data, Report by the Comptroller General of the United States, CED-78-132, June 1978.

44/ Foreign Investments in U.S. Real Estate, p. 55.

is desired, it is performed by a professional U.S. appraiser. When financing is desired, foreign investors use the same channels an American would use. U.S. title companies, property management firms, attorneys, abstractors, surveyors, etc., are engaged. Foreign investors pay property taxes; they buy hazard insurance; they try to avoid, but not evade, income taxes. It is perhaps not a gross oversimplification to state that there are only a few differences between foreign and American investors.

One difference is the aliens' more extensive use of U.S. commercial banks and the real estate divisions of stock brokerage firms for advice and referrals. Another is that Canadians may use Canadian banks for financing and Canadian personnel for property management and other purposes. On the whole, however, as more than one real estate professional has remarked, it is quite difficult to distinguish Canadian behavior in the U.S. market from that of U.S. personnel; in fact, to some real estate professionals, Canadians are less foreign than investors from an adjacent state.

U.S. real estate brokers who deal with foreign investors do not seem to accord them treatment different from that which they would give to Americans. They may show courtesy by answering midnight phone calls and by meeting early-morning or weekend flight arrivals, but this courtesy would be extended to out-of-town American real estate investors as well. Some brokers may attempt to palm off distressed, difficult-to-sell, or overpriced property, but they might offer the same property to out-of-town Americans. Brokers may report that they represent an undisclosed wealthy foreign real estate investor, which may create an aura of mystery; but often such a veil serves only to protect the broker who doesn't want other brokers to reach his client.

Alternatively, the foreign investor may insist on secrecy, but certainly many Americans have done the same. Many U.S. brokers would not reveal the identities of their U.S. clients in certain transactions. Many foreign investors do want anonymity, but their reasons are not necessarily just to hide from legal authorities here or in their homeland.

Experienced brokers are careful about transmitting information they hold. They prefer to divulge information about property and people only to those in a position to help them or cooperate with them in completing a sale. They are sensitive to the possibility that property could be sold or clients approached from "around them." So they protect their information by limiting disclosure.

Appraisers will protect information similarly. If their clients had at their fingertips the same information that appraisers do, it would obviate the need for an appraisal, at least in some situations. Still, appraisers are glad to share information with other appraisers to establish reciprocity, thus making assignments more manageable.

Property managers will share aggregate data but not release performance statistics on an individual building. That, they feel, could invite competition or present other problems.

There are other sources of information about real estate and ownership. Information is held by title companies, lending institutions, lawyers, CPAs, surveyors, tax rolls, courthouse records, state governments, and Federal government agencies (HUD, IRS, the Department of Agriculture, the Department of Commerce, the Census Bureau, DOT, etc.). However, pulling it all together, given present policies, would be impossible.

The lack of complete information on real estate does not mean that the rights of U.S. citizens have been infringed. Some are frustrated when they independently attempt to appraise their own home or uncover liens against it. The problem becomes more acute, for example, when they inherit real estate located in another state. Unlike publicly traded marketable securities, commodities, and many other investments, there are no publicly available prices for real estate. There are no annual, audited reports of buildings or farms. The absence of this information, combined with the illiquidity presented by real estate, can inhibit some from buying real estate, but it does not seem to have affected access to real estate investing. Considering that 65 percent of Americans live in dwellings that they own, the lack of available information does not seem to have prevented American citizens from real estate ownership. Furthermore, the lack of widespread information does not seem to have prevented individuals from entering the real estate business.

Chapter 3

STATE CONTROLS AND REPORTING REQUIREMENTS

Rolland L. Morse, H. Clyde Reeves
and Neil E. Harl*

INTRODUCTION

This chapter consists of three parts. The first, a State-by-State survey, is a compilation of existing State legislation relating to foreign investment in real estate and includes a brief summary of recent activities in the State legislatures. The second section looks at the States' experiences in enforcing the above-mentioned legislation. The final section appears as an appendix and analyzes the Iowa reporting system in detail.

STATE-BY-STATE SURVEY

This survey summarizes all State statutes dealing with foreign ownership, acquisition, or use of real estate. A special emphasis is placed on those specific provisions which may be useful for information-gathering purposes. The constitutionality of these statutes is not discussed because the mandate for this study is to examine possible methods for gathering information on foreign investment in real estate.

Because this survey is designed for the purposes of this study, it is not concerned with details and possible ambiquities in the laws of the various States. Therefore, this survey should not be relied upon by anyone for purposes of determining the status of the law in any particular State.

The various State restrictions are divided into three main categories. The first, General Landownership and Use Restrictions, pertains to statutes that are designed to directly limit foreign ownership or use of U.S. real estate. The second, Alien Reporting Requirements, summarizes State provisions that require aliens (or corporations with alien shareholders) with an interest in real estate to report that

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*/ The State-by-State survey section of this chapter was researched and prepared by Mr. Morse, Legal Technician, ESCS, USDA, law student, Antioch School of Law. The States' experiences section was researched by Mr. Reeves, a subcontractor of the Lincoln Institute of Land Policy, and was prepared by Mr. Morse. The Appendix was prepared by Professor Harl.

interest to some governmental authority. The third category, Corporate Restrictions and Requirements, looks at corporate restrictions and requirements (not necessarily designed with alien investors in mind) which may affect the information-gathering process.

GENERAL LANDOWNERSHIP AND USE RESTRICTIONS

In listing the various and diverse State restrictions on foreign investment in real estate, it is helpful to subdivide this category into major and minor restrictions. This distinction is merely one of degree to sort out the numerous restrictions.

Major restrictions include such restrictions as those in Minnesota, where nonresident aliens are prohibited from acquiring agricultural land; or the Indiana restrictions which prohibit aliens from holding more than 320 acres for more than 5 years.

Minor restrictions are restrictions of a lesser degree. They include:

- An exclusion of "enemy" aliens from property ownership.
- A requirement that aliens be "friends."
- A requirement that aliens be "eligible" for "citizenship" (this has been construed generally to mean eligible under the U.S. immigration laws and regulations).
- A bar on purchase of State lands by nonresidents of the State.
- Making an alien's right of inheritance of real property contigent on the reciprocal right existing for U.S. citizens in the alien's home country.

It must be noted that some of the above restrictions are more "minor" than others. Exclusion of "enemy" aliens from landownership probably is of no real consequence to most investors; but if the reciprocity contingency for inheritance was enforced stringently, it could have a substantial effect on some foreign investors. Those investors from countries which do not grant a reciprocal right of inheritance to U.S. citizens would, all other things being equal, have a greater tendency to use devices such as corporations and trusts to hold land.

ALIEN REPORTING REQUIREMENTS

In a relatively recent trend, a few States have passed legislation to require alien investors to report the nature and extent of their investment to a central State authority. The requirements may pertain to individuals or to corporations with a certain percentage of alien shareholders.

This type of legislation differs from the general-restriction type in that the purpose of this type of legislation is to provide information to the State's decisionmakers. Presumably, this information will allow the decisionmakers to decide whether restrictions are needed and, if so, what kind.

CORPORATE RESTRICTIONS AND REQUIREMENTS

This section summarizes State restrictions and requirements imposed upon corporations which may provide some information as to alien investment in those States. These requirements generally were not passed with alien real estate investors specifically in mind, so much of the useful information that results is a byproduct of the primary function of the legislation.

Most States require that foreign corporations 1/ apply to the Secretary of State for a certificate of authority prior to transacting business 2/ in the State. The application, because of a model corporate code, is similar in most States. These applications require the applying corporation to disclose several items which are of interest to this study, viz:

- The name of the corporation and the jurisdiction of its incorporation.
- Address of its principal office in the jurisdiction of its incorporation.
- Brief description of the character of the business it proposes to transact in the State.
- Names and addresses of the directors and officers.

In addition to the certificate of authority, most States require that all corporations, incorporated in the State or doing business in the State, file an annual report. This annual report also is part of the model code which is followed by most States, and the information required by it usually duplicates the information from the certificate of authority.

There also are several States that place corporate restrictions on ownership and use of farm land. These laws affect domestic and foreign corporations alike; but they are included here because of the effect they have on foreign investment, and the corresponding effect on information systems designed to monitor foreign investment.

SUMMARY

There are 16 States with major restrictions: Arkansas, Connecticut, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Wisconsin.

1/ A foreign corporation is any corporation incorporated outside of the State. Alien corporations (corporations incorporated outside the United States) are, of course, foreign corporations as well and are treated, unless otherwise noted, simply as foreign corporations.

2/ The definition of "transacting business" varies from State to State and may or may not include the mere corporate ownership of real property in the State.

Sixteen States have minor restrictions: Alaska, Arkansas, California, Hawaii, Georgia, Idaho, Kansas, Maryland, Montana, Nevada, New Jersey, North Carolina, Oregon, South Carolina, Virginia, and Wyoming.

Six States have laws requiring the reporting of nonresident alien interest in agricultural land: Arkansas, Iowa, Minnesota, Nebraska, North Dakota, and Ohio. 3/

Eight States have restrictions on corporate ownership of real estate: Kansas, Kentucky, Minnesota, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin.

RECENT STATE ACTIVITIES

Foreign ownership of real estate, especially agricultural real estate, is a serious political issue this year among the States. In the most recent legislative sessions in the States, bills relating to foreign investment in real estate have been introduced in at least 20 States. As of July 15, 1979, 7 States, Arkansas, Iowa, Missouri, North Carolina, North Dakota, Ohio, South Dakota, and Virginia, have passed legislation relating to foreign investment in real estate during the past year. While bills have died in most of the other States, the sponsors of several of the bills indicate that they will reintroduce their bills in their next legislative sessions.

STATE SUMMARIES 4/

Alabama

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations must file a certified copy of their articles of incorporation prior to transacting business in the State. Ala. Code §10-2-250 (1977).

Alaska

I. General landownership and use restrictions:
   A. Major--none.
   B. Minor--Mining rights may be acquired only by adult citizens, aliens who have declared their intent to become citizens, aliens whose home country grants reciprocal treatment, and certain corporations. Alaska Stat. §38.05.190 (1973).

3/ Virginia has a reporting law but it will not be implemented, if ever, until an undetermined future date (see Virginia summary). North Carolina has passed legislation which will allow the Secretary of State to collect information from the Federal Government on foreign ownership of real property (see North Carolina summary).

4/ These summaries are current as of July 15, 1979.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Domestic corporations: Articles of incorporation must include name and address of each affiliate 5/ which is a nonresident alien or a corporation whose place of incorporation is outside the United States. Alaska Stat. §10.05.255 (Supp. 1976).

B. Foreign corporations: A certificate of authority is required. The application must include (1) name and address of each affiliate which is a nonresident alien or a corporation whose place of incorporation is outside the United States, and the percentage of outstanding shares controlled by each affiliate; and (2) the name and address of a person owning at least 5 percent of the shares or 5 percent of any class of shares, and the percentage of the shares or class of shares owned by that person. Alaska Stat. §10.05.615 (Supp. 1976).

Arizona

I. General landownership and use restrictions:

A. Major--none.

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. No sales, leases, or subleases of State land shall be made to corporations or associations not qualified to transact business in this State. Ariz. Rev. Stat. §37-240B (1978).

B. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Ariz. Rev. Stat. §§10-106, 10-110 (1975).

C. All corporations must file annual reports (model code disclosures and names of shareholders holding more than 20 percent of any class of shares, including persons beneficially holding shares through nominees). Ariz. Rev. Stat. §10-125 (1975).

D. No individual, corporation, or association may purchase more than 160 acres of agricultural land or more than 640 acres of grazing land. Ariz. Const. Art. 10, §11.

5/ An affiliate is a person with legally enforceable control of stock.

Arkansas

I. General landownership and use restrictions:

A. Major

1. Resident aliens may acquire any interest in any real estate. Nonresident aliens may acquire any interest in any real estate except agricultural land. The restrictions set forth in this Act do not apply to agricultural land acquired by a foreign party (nonresident aliens, foreign governments, alien corporations, and associations, partnerships, or any other legal entities which are substantially controlled by nonresident aliens) for immediate or potential use for nonfarming purposes. 1979 Ark. Acts, Act 1096, §§7, 9, 10.

2. Enforcement. The Attorney General may enforce this restriction by filing an action in the circuit court of the appropriate county. If the court finds that the land has been acquired or is held in violation of this Act, the court shall enter a declaratory judgment of the violation and order that the agricultural land be divested within 2 years to a nonforeign party. Any land not divested within 2 years shall be ordered sold at a public sale. 1979 Ark. Acts, Act 1096, §5.

B. Minor--Aliens are ineligible to obtain a deed to tax-forfeited agricultural land from the State until they are naturalized. Ark. Stat. Ann. §10-926 (1976).

II. Alien reporting requirements:

A. Any foreign party that acquires any interest in agricultural land shall register such ownership in the office of the circuit clerk in the county in which the land is located within 60 days after such acquisition. The registration shall include (1) a description of the land acquired, and (2) the name and business address of the foreign party which acquired the lands or on whose behalf the lands were acquired. The circuit clerk will record this information and forward a copy to the Secretary of State. 1979 Ark. Acts, Act 1096, §3.

B. Any foreign party who acquires agricultural land for nonfarming purposes shall file with the circuit clerk or the Secretary of State within 60 days of the acquisition, a declaration of the intended use of the land, the foreign party's identity, and a legal description of the land acquired. Any foreign party who acquires agricultural land for nonfarming purposes and fails to put the land to the use described in his declaration of intent within 5 years of the filing of that declaration, shall re-regis-

ter the land with the county clerk. Failure to resgister ownership is subject to the enforcement provisions of section 5. 1979 Ark. Acts, Act 1096, §10.

III. Corporate restrictions and requirements: Foreign corporations must file a copy of their articles of incorporation prior to transacting business in the State. Ark. Stat. Ann. §64-1201 (1966 Supp. & 1977).

California

I. General landownership and use restrictions:

A. Major--none.

B. Minor--only persons who are citizens of the United States, or who have declared their intention of becoming citizens, or whose country grants reciprocal rights, or who are granted the right by treaty may be issued prospecting permits or leases on public lands. Alien corporations are not eligible for the above rights unless 90 percent or more of the shares are owned by eligible persons or corporations.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of qualification prior to transacting business in the State (minimal disclosures). Cal. Corp. Code §2108 (1977).

B. All corporations must file annual reports (minimal disclosures). Cal. Corp. Code §2108 (1977).

Colorado

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Colo. Rev. Stat. §7-9-101 (1973).

B. All corporations must file annual reports (model code disclosures). Colo. Rev. Stat. §7-10-101 (1973).

Connecticut

I. General landownership and use restrictions:

A. Major

1. Resident aliens and citizens of France may hold real estate without limitation. Conn. Gen. Stat. Ann. §47-57 (Supp. 1978).

2. Nonresident aliens are only authorized to hold and transmit real estate if it is used in mining and developing the products of the mine. Conn. Gen. Stat. Ann. §47-58 (1960).

3. Probate court has discretionary power of the sale of property where legatee, beneficiary, etc., is a nonresident alien. Conn. Gen. Stat. Ann. §45-27 (Supp. 1978).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Conn. Gen. Stat. Ann. §§33-396, 33-399 (Supp. 1978).

B. Foreign corporations must file annual reports (model code disclosures). Conn. Gen. Stat. Ann. §33-406 (Supp. 1978).

Delaware

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must register before doing business in the State. Del. Code tit. 8, §371 (1974).

B. Foreign corporations must file annual reports (model code disclosures and amount of capital invested in real estate and other property). Del. Code tit. 8, §374 (1974).

District of Columbia

I. General landownership and use restrictions: none.

[Note: There are provisions in the U.S. Code and the District of Columbia Code relating to the alien ownership of land in the District of Columbia (48 U.S.C. 1501 et seq., D.C. Code §45-1501 et seq.). These provisions are, on their face, contradictory internally and with each other. Although ambiguous, a plain reading indicates that the intent of the statutes may have been to restrict alien property ownership in the District of Columbia. A review of the legislative history and subsequent court decisions indicates otherwise, and one must conclude that there are no restrictions on alien ownership of land in the District of Columbia (see H.R. Rep. No. 4219, 58th Cong., 2d Sess. (1905); S. Rep. No. 2160, 58th Cong., 2d Sess. (1904); Cohen v. Cohen, 47 App. D.C. 129 (1977); Larkin v. Washington Loan & Trust Co., 31 A. 2d 635 (D.C. Cir. 1929).]

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority before transacting business in the State (model code disclosures). D.C. Code §29-933 (1973).

B. Foreign corporations must file annual reports (model code disclosures). D.C. Code §29-933m (1973).

Florida

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Fla. Stat. Ann. §607.304 (1977).

B. All corporations must file annual reports (model code disclosures). Fla. Stat. Ann. §607.357 (1977).

Georgia

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Aliens who are the subjects of governments at peace with the United States shall have the privilege of purchasing, hold-

ing, and conveying real estate. Ga. Code Ann. §79-303 (1973).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations need a certificate of authority to transact business in the State (model code disclosures). Ga. Stat. Ann. §22-1401 (1977).

Hawaii

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Only persons who are U.S. citizens and are residents of Hawaii (or who have declared their intent to become citizens and are residents of Hawaii) may purchase a residential lot in a "development area." Haw. Rev. Stat. §206.9 (1976).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations, prior to doing business in the State, must file with the Director of the Regulatory Agencies a sworn disclosure statement (model code disclosures) and a copy of the corporations' articles of incorporation. Haw. Rev. Stat. §418-1 (2) (1976).

B. All corporations must make annual reports (minimal disclosures). Haw. Rev. Stat. §§416-95, 418-9 (1976).

Idaho

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Only U.S. citizens and aliens who have declared their intention to become U.S. citizens may purchase State lands. Idaho Code §58-313 (1976).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must file evidence of incorporation prior to transacting business in the State. Idaho Code §30-501 (Supp. 1978).

B. All corporations organized or doing business in this State must file annual reports (model code disclosures). Idaho Code §30-601 (Supp. 1978).

Illinois

I. General landownership and use restrictions:

A. Major--Aliens may acquire land by purchase or inheritance, provided they dispose of the land within 6 years or become U.S. citizens, upon penalty of escheat. Ill. Ann. Stat. ch. 6, §§1, 2, 3, (1975 and Supp. 1978).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations need a certificate of authority to transact business in the State (model code disclosures). Ill. Ann. Stat. ch. 32 §157.102 (1954).

B. All corporations must file annual reports (model code disclosures). Ill. Ann. Stat. ch. 32, §157.115 (1954 & Supp. 1978).

Indiana

I. General landownership and use restrictions:

A. Major--Aliens may take and convey realty, but if an alien acquires more than 320 acres, he must, within 5 years, dispose of the Indiana lands or become a U.S. citizen. Ind. Code Ann. §§32-1-7-1, 32-1-7-2 (1973 Supp. & 1978).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority before transacting business in the State (model code disclosures). Ind. Code Ann. §23-1-11-1 (1972).

B. All corporations must make annual reports (model code disclosures). Ind. Code Ann. §23-1-11-7 (1972).

Iowa

I. General landownership and use restrictions:

A. Major

1. Nonresident aliens, corporations created under the laws of a foreign country, or business entities in which a majority interest is owned directly or indirectly by nonresident aliens, shall not purchase or otherwise acquire agricultural land in

this State after the effective date of this Act, January 1, 1980 (upon penalty of escheat). H.F. 148, Acts of the 68th Iowa General Assembly (1979) §§2, 3, 4.

2. The above restrictions do not apply to agricultural land acquired by devise or descent nor shall it apply to an interest in agricultural land, not to exceed 320 acres, acquired for an immediate or pending use other than farming. The land must be put to that use within 5 years (upon penalty of escheat). Land acquired by devise or descent must be disposed of within 2 years from the date of acquisition (upon penalty of escheat). Id. §§5, 6, 11.

II. Alien reporting requirements:

A. Registration. Nonresident aliens, corporations created under the laws of a foreign country, business entities in which a majority interest is owned directly or indirectly by nonresident aliens, or a foreign government which owns an interest in agricultural land must register the land with the Secretary of State. The registration shall contain the name of the owner and the location and number of acres. If the owner of the land is an agent, trustee, or fiduciary of a nonresident alien, foreign business, or foreign government, the registration shall contain the name of the principal for whom the land was purchased. Id. § 8.

B. Reports. A nonresident alien, foreign business, or foreign government, who acquires agricultural land not subject to the restrictions of this Act because the land was acquired for an immediate or pending use other than farming, shall file a report with the Secretary of State before March 31 of each year. The report shall contain the following:

1. The name of the owner of the land or owner of the interest in the land.

2. If the land is owned by an agent, trustee, or fiduciary of a nonresident alien, foreign business, or foreign government, the name of the principal for whom the land is purchased.

3. The location and the number of acres.

4. The date the land or the interest in the land was acquired.

5. The immediate and pending use for which the land or the interest in the land was acquired, and the status of the land's development for the purpose other than farming.

6. The present use of the land. Id. § 9.

C. Failure to register as required by section 8 of this Act, or to file a report as required by section 9 of this Act shall, for each offense, be punished by a fine of not more than $2,000. Id. §12.

D. Corporations and limited partnerships owning or leasing agricultural land or engaged in farming must file yearly reports with the Secretary of State. The corporate reports must include, among other things, the name, address, residence, citizenship of and number of shares held by any nonresident alien shareholder holding 5 percent or more of any class of stock. The limited partnership reports must include, among other things, the name, residence, and citizenship of each nonresident alien partner. Iowa Code Ann. §§172C.5, 172C.6 (Supp. 1978-79).

E. The county assessor shall forward to the Secretary of State, each year, the name and address of every corporation, nonresident alien, and trust owning agricultural land in the county, as shown by the assessment rolls of the county. Iowa Code Ann. §172C.12 (Supp. 1978-79).

F. The county recorder shall forward to the Secretary of State, each year, the names and addresses of each limited partnership owning agricultural land or engaged in farming in the county as shown by county records. Iowa Code Ann. §172C.13 (Supp. 1978-79).

III. Corporate restrictions and requirements:

A. No corporation may acquire or lease agricultural land. There are several exceptions including those for family farm corporations and corporations acquiring agricultural land for nonagricultural purposes. H.F. 451, Acts of the 68th Iowa General Assembly (1979).

B. See II.D.

C. Foreign corporations must obtain a certificate of authority prior to transacting business in this State (model code disclosures). Iowa Code Ann. §496A.103 (Supp. 1979-80).

D. All corporations must file annual reports (minimal disclosures). Iowa Code Ann. §496.1 (Supp. 1979-80).

Kansas

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Aliens ineligible for U.S. citizenship may inherit, hold, or transmit real estate in Kansas only as permitted by treaty. Kan. Stat. §59-511 (1976).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Corporations may not engage directly or indirectly in any agricultural or horticultural business. There are several broad exceptions, including the following:

1. Corporations which do not have more than 10 stockholders.

2. Corporations which do not own or control more than 5,000 acres of land.

B. Foreign corporations must obtain a certificate of authority prior to doing business in the State (model code disclosures). Kan. Stat. §17-7301 (Supp. 1977).

C. All corporations must make annual reports.

1. Model code disclosures.

2. When agricultural or horticultural land is held by a corporation, the following reports must be made:

a. Acreage and location of each parcel owned or leased by the corporation and used or useable for agricultural or horticultural purposes.

b. Purposes for which land is owned or leased.

c. Value of nonagricultural assets and agricultural assets stated separately (assets within the State).

d. Total number of stockholders.

Kentucky

I. General landownership and use restrictions:

A. Major

1. Any alien, not an enemy, after declaring his intention to become a U.S. citizen may inherit, hold, and alienate real property as if he were a citizen. Ky. Rev. Stat. §381.290 (1972).

2. Realty of an alien may be escheated to the State any time after the expiration of 8 years after he acquires title, unless the alien disposes of the property or becomes a citizen prior to escheat. Ky. Rev. Stat. §381.300 (1972). [The escheat provisions do not apply to corporations even where wholly owned by a nonresident alien. Ky. Rev. Stat. §381.300 (Supp. 1978).]

3. A resident alien, not an enemy, may take and hold real property for the purpose of business or residence, for a term not exceeding 21 years. Ky. Rev. Stat. §381.320 (1972).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. No corporation shall hold any real estate except that which is necessary and proper for carrying out its legitimate business, for a period of more than 5 years (upon penalty of escheat). Ky. Rev. Stat. §271A.705 (Supp. 1978).

B. Foreign corporations must obtain a certificate of authority in order to transact business within the State (model code disclosures). Ky. Rev. Stat. §271A.520 (Supp. 1978).

C. All corporations must make annual reports (model code disclosures). Ky. Rev. Stat. §271A.615 (Supp. 1978).

<u>Louisiana</u>

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). La. Rev. Stat. Ann. §§12:301, 12:304 (1969).

B. All corporations must file annual reports (model code disclosures). La. Rev. Stat. Ann. §§12:309, 12:102 (1969).

<u>Maine</u>

I. General Landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Me. Rev. Stat. tit. 13-A, §1202 (1977).

B. All corporations must file annual reports (model code disclosures). Me. Rev. Stat. tit. 13-A, §1301 (1977).

Maryland

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Any alien, not an enemy, may own, sell, devise, dispose of, or otherwise deal with property in the same manner as if he had been a citizen of the State by birth. Md. Real Prop. Code, §14-101 (1974).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must register prior to doing business in the State. Md. Corp. and Ass'ns Code Ann. §7-202 (Supp. 1978).

B. All corporations must file annual reports (minimal disclosures). Md. Corp. and Ass'ns Code Ann. §2-314 (Supp. 1978).

Massachusetts

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must apply for a certificate of authority within 10 days after commencing business in the State (model code disclosures). Mass. Gen. Laws. Ann. ch. 181, §4 (1977).

B. All corporations must file annual reports (model code disclosures). Mass. Gen. Laws Ann. ch. 156B, §109 (Supp. 1978).

Michigan

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Mich. Stat. Ann. §§21.200(1011), 21.200(1015) (Supp. 1978).

B. All corporations must file annual reports (model code disclosures). Mich. Stat. Ann. §§21.200(901), 21.200(1003) (1974).

Minnesota

I. General landownership and use restrictions:

A. Major--No individual shall acquire an interest in agricultural land unless a citizen of the United States or a permanent resident alien. No corporation, partnership, or other business entity shall obtain an interest, whether beneficial or legal, in any title to agricultural land unless 80 percent of each stock class is held directly or indirectly by U.S. citizens or permanent resident aliens with the following exclusions:

1. Agricultural land acquired by devise, inheritance, or security for indebtedness is excluded, provided that all agricultural land acquired by such means is disposed of within 3 years.

2. This section will not apply where its enforcement would be violative of a treaty of the United States.

Violations of the above are on penalty of escheat. Minn. Stat. Ann. §500.221 (Supp. 1979).

B. Minor--none.

II. Alien reporting requirements: Persons, corporations, etc., already in possession of agricultural land prior to May 27, 1977, may retain possession, provided owner files annual reports with the Commissioner of Agriculture. These reports shall include, among other things, the following:

- Description of all agricultural land held within the State.

- Purchase price and market value of land.

- The use to which the land is put.

- Date of acquisition.

- Other reasonable information required by the Commissioner.

Minn. Stat. Ann. §500.221 (Supp. 1979).

III. Corporate restrictions and requirements:

A. A corporation may not engage in farming or acquire land capable of being used for farming (there are some narrow exceptions for family farms, experimental farms, breeding farms, and non-profit corporations). Minn. Stat. Ann. §500.24 (Supp. 1979).

B. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Minn. Stat. Ann. §§303.03, 303.06 (1969).

C. Foreign corporations must file an annual report (model code disclosures). Minn. Stat. Ann. §303.14 (1969).

D. See I.A.

Mississippi

I. General landownership and use restrictions:

A. Major--Resident aliens may hold and dispose of land as if they were citizens. Nonresident aliens may not own land, upon penalty of escheat, with the following exceptions: a person who has declared his intention to become a citizen, property acquired as security for a debt, and citizens of Syria and Lebanon acquiring through inheritance. Miss. Code Ann. §89-1-23 (1972).

B. Minor--Corporations, nonresident aliens, and associations composed in whole or part by nonresident aliens may not directly or indirectly purchase or become owners of State land. Miss. Code Ann. §29-1-75 (1972).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Miss. Code Ann. §§79-3-211, 79-3-219 (1972).

B. All corporations must file annual reports (model code disclosures). Miss. Code Ann. §79-3-249 (Supp. 1978).

Missouri

I. General landownership and use restrictions:

A. Major

1. Nonresident aliens may acquire real estate except agricultural land, and can hold and devise such land as if they were

citizens. Agricultural land is defined as more than 5 acres, whether inside or outside corporate limits, capable of supporting an agricultural enterprise. Agricultural land held prior to the passage of this law may be held by present owners.

2. Nonresident aliens may acquire agricultural land for immediate or potential use in nonfarming purposes. During the pending development of the agricultural land for nonfarm purposes, the land may not be used for farming except by lease to a family farm unit, or a family farm corporation. Mo. Rev. Stat. §§442.560 (Supp. 1978), 442.591 (Supp. 1979), and 474.100 (1969). See III.A.

B. Minor--none.

II. Alien reporting requirements: The following reporting requirements are very similar to the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA).

A. Any foreign person (a nonresident alien, a business entity substantially controlled by nonresident aliens, alien corporations, or a foreign government) who holds any interest in agricultural land must submit a report to the Director of Agriculture within 60 days of the effective date of this section. These reporting requirements do not apply to foreign persons who hold an interest in agricultural land for the extraction, refining, processing, or transportation of oil, gas, coal, or lignite. The reports shall contain the following:

1. The legal name and address of the foreign person.

2. The citizenship of the foreign person, or its principal place of business and nation where it was created.

3. The legal name and address of each person who holds a substantial interest in the foreign person, and that person's citizenship or its principal place of business and the nation where it was created.

4. The type of interest that is held in agricultural land.

5. A legal description of the agricultural land.

6. The date of acquisition and the purchase price.

7. A declaration of the intended agricultural use.

8. If the land was acquired for a nonfarm use (under §442.591) its intended use. Mo. Rev. Stat. §442.592 (1979).

B. Any foreign person who acquires or transfers any interest in agricultural land shall submit a report to the Director of Agriculture within 30 days of the date of acquisition or transfer. The remaining provisions listed in II.A. also apply here. Mo. Rev. Stat. §442.592 (1979).

C. Any person who fails to file a report required under the provisions of this section is liable for an amount not to exceed 25 percent of the fair market value of the person's interest in the agricultural land. Mo. Rev. Stat. §442.592 (1979).

III. Corporate restrictions and requirements:

A. Corporate ownership of agricultural land is generally prohibited with the major exceptions of family farm corporations and corporations owning agricultural land as of 9/28/75. Mo. Rev. Stat. 492.560 (Supp. 1979).

B. Every corporation engaged in farming must file annual reports which do not relate to the alienage of shareholders. Mo. Rev. Stat. §§350.010-350.030 (Supp. 1979).

C. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Mo. Rev. Stat. §§351.570, 351.580 (Supp. 1978).

D. Every corporation must register annually (minimal disclosures). Mo. Rev. Stat. §351.120 (Supp. 1978).

Montana

I. General landownership and use restrictions:

A. Major--none.

B. Minor

1. An alien's right to inherit and devise is contingent on reciprocal rights in the alien's home country for U.S. citizens. Mont. Rev. Code Ann. §91A-2-11 (Supp. 1977).

2. State lands may be sold only to citizens and those persons who have declared their intent to become citizens or corporations organized under the laws of this State. As far as it is possible to determine, lands should not be sold to speculators. No person or corporation is eligible to purchase more than one section of land. Mont. Rev. Code Ann. §81-908 (1966 and Supp. 1977).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Mont. Rev. Code. Ann. §§15-22-99, 15-22-103 (1967 and Supp. 1977).

B. All corporations must file an annual report (model code disclosures and the value of all property within the State). Mont. Rev. Code Ann. §15-22-118 (1967).

Nebraska

I. General landownership and use restrictions:

A. Major

1. Aliens and foreign corporations are prohibited from acquiring title to land or holding an interest in land (upon penalty of escheat). Neb. Rev. Stat. §76-402 (1976).

2. A resident alien may acquire land by devise or descent only, provided the alien disposes of the property 5 years from the date of acquisition (upon penalty of escheat). Neb. Rev. Stat. §76-405 (1976).

The above provisions do not apply to any real estate within the corporate limits of cities or villages, or within 3 miles thereof, nor to manufacturing or industrial establishments. Neb. Rev. Stat. §76-414 (1976).

B. Minor--A nonresident alien's right of inheritance is contingent upon a reciprocal right for U.S. citizens in the alien's home country. Neb. Rev. Stat. §4-107 (1977).

II. Alien reporting requirements: See III.C.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (minimal disclosures). Neb. Rev. Stat. §21-20, 21-109 (1977).

B. All corporations must file an annual report (minimal disclosures). Neb. Rev. Stat. §§21-301, 21-304 (1977).

C. All corporations holding agricultural land must file annual reports disclosing, among other things, the following (the maximum penalty is $1,000):

1. Names and addresses of a member of the board of directors and all shareholders owning 10 percent or more of the stock.

2. The percentage of the members of the board of directors who are aliens.

3. Name and address of each alien owning 10 percent or more of the voting stock.

Neb. Rev. Stat. §§76.1501-76.1506 (1976).

D. Corporations with a majority of the capital stock owned by aliens, or with a majority of the board of directors consisting of aliens, shall be a foreign person under the laws of this State. In the event of the above, a domestic corporation shall be dissolved and a foreign corporation will forfeit its right to do business in the State. Neb. Rev. Stat. §§76-406, 76-407 (1976).

Nevada

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Aliens residing outside the United States inherit property only in the same manner as a reciprocal right is accorded to U.S. citizens. Nev. Rev. Stat. §134.230 (1977).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Nev. Rev. Stat. §80.010 (1977).

B. All corporations must file annual reports (model code disclosures). Nev. Rev. Stat. §80.110 (1977).

New Hampshire

I. General landownership and use restrictions: An alien resident in this State may take, purchase, hold, convey or devise real estate; and it may descend in the same manner as if he were a citizen. N.H. Rev. Stat. Ann. §477.20 (1968). This has been held to mean that nonresident aliens may not inherit property. Hanglin v. McCarthy, 95 N.H. 36, 37, 57 A. 2d 148, 149 (1948); Lazarou v. Moraras, 101 N.H. 383, 143 A. 2d 669 (1958).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in this State (model code provi-

sions). N.H. Rev. Stat. Ann. §300.4 (1977).

B. All corporations must file annual reports (model code disclosures). N.H. Rev. Stat. Ann. §294.105 (1977).

New Jersey

I. General landownership and use restrictions: none.

A. Major--none.

B. Minor--"Alien friends" have the same rights with respect to owning real property as do citizens. N.J. Stat. Ann. §46:3-18 (Supp. 1979-80).

II. Alien reporting requirements: none.

III. Corporate requirements and restrictions:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). N.J. Stat. Ann. §§14A:13-3, 14A:13-4 (1969).

B. All corporations must file an annual report (model code disclosures). N.J. Stat. Ann. §14A:4-5 (Supp. 1978-79).

C. Corporate Business Activities Reporting Act: Foreign corporations which are not doing business in the State (and thus disclaim need for certificate of authority), but which have certain "minimal" contacts within the State, must file a business activities report supplied by the State. "Minimal" contacts include ownership of real property. N.J. Stat. Ann. §14A:13-15 (Supp. 1978-79).

New Mexico

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate requirements and restrictions:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures and an estimate of value of all property to be owned in the State in current fiscal year). N.M. Stat. Ann. §§53-17-1, 53-17-5 (1978).

B. All corporations must make annual reports (model code disclosures). N.M. Stat. Ann. §53-5-2 (1978).

New York

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). N.Y. Bus. Corp. Law §1304 (1963 & Supp. 1978-79).

North Carolina

I. General landownership and use restrictions:

A. Major--none.

B. Minor--The right of aliens to inherit real property is contingent on the reciprocal right existing in the alien's home country for U.S. citizens. N.C. Gen. Stat. §64-3 (1972).

II. Alien reporting requirements: The Secretary of State is authorized and directed to collect all information obtainable from reports by aliens made to agencies of the Federal Government on ownership of real property interests in North Carolina, to be updated every 3 months, and to maintain a file on such information which shall be available to members of the General Assembly and the public. N.C. Gen. Stat. §64-1.1 (1979).

III. Corporate restrictions and requirements: Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). N.C. Gen. Stat. §55-140 (1975).

North Dakota

I. General landownership and use restrictions:

A. Major

1. A person who is not a citizen of the United States, except a permanent resident alien or a citizen of Canada, may not acquire (after July 1, 1979), directly or indirectly, any interest in agricultural land. Nor may a business entity acquire an interest, direct or indirect, in agricultural land unless the beneficial ownership of the entity is held by citizens of the United States or Canada or permanent resident aliens. This does not apply to agricultural land that is acquired by devise or descent, as security for indebtedness, or by process of law in the collection of debts; provided that all agricultural land acquired in the collection of debts be disposed of within 3 years after acquiring ownership. This section

does not apply to citizens or subjects of a foreign country whose rights to hold land are secured by treaty. N.D. Cent. Code §47-01-11(2) (effective July 1, 1979).

2. A register of deeds in this State may not record any instrument affecting title to agricultural land where the acquiring person or business is in violation. §47-01-11(2). N.D. Cent. Code §47-01-11(3) (effective July 1, 1979).

3. The Attorney General shall enforce the above provisions by filing an action in the district court of the county where any land held in violation of this act is situated. If the court finds the land in question is held in violation of this act, it shall enter an order so declaring. The Attorney General shall file any such order with the register of deeds in the county where the land is located. The person or business entity holding the land shall then have 1 year to divest himself/itself of the land. The 1 year limitation is deemed a convenant running with the land. Any land not divested within 1 year will be sold at public auction. N.D. Cent. Code §47-01-11(4) (effective July 1, 1979).

B. Minor--none.

II. Alien reporting requirements: Any person or business entity prohibited under this act from acquiring agricultural land after July 1, 1979, and who owns agricultural land within this State must file a report with the Commissioner of Agriculture by October 1, 1979, and annually before July 1, thereafter. The report shall contain the following:

- Description of all agricultural land owned within the State.

- Purchase price and market value of the land.

- The use to which the land is put.

- Date of acquisition.

- Any other reasonable information the Commissioner may require.

The Commissioner shall make the information available to the public. Willful failure to properly report or failure to comply with the other sections of the act is a class A misdemeanor. N.D. Cent. Code §47-01-11(5)(6) (effective July 1, 1979).

III. Corporate restrictions and requirements:

A. Farming by domestic and foreign corporations is prohibited. N.D. Cent. Code §10-06-01 (1976).

B. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures and an estimate of the value of property to be located in the State). N.D. Cent. Code §§10-22-01, 10-22-05 (1976).

C. All corporations must file an annual report (model code disclosures and an estimate of the value of property to be located in this State). N.D. Cent Code §10-23-01 (1976).

Ohio

I. General landownership and use restrictions: none.

II. Alien reporting requirements:

A. All nonresidents who acquire any interest, directly or indirectly, in real property located in this State that is in excess of 3 acres or that has a market value greater than $100,000 or any interest in mining or minerals that has a market value in excess of $50,000 must, within 30 days of the acquisition, file a report with the Secretary of State. The report must contain the following:

1. Name, address, and telephone number.

2. County of citizenship.

3. Location and amount of acreage of real property.

4. Intended use of real property at the time of filing.

Ohio Rev. Code §5301.254 (1979).

B. Corporations and other business entities must also file reports if they acquire any interest in real property that exceeds the limits stated in II.A., and if either a nonresident alien owns at least a 10 percent interest in the entity or any number of nonresident aliens own at least a 40 percent interest in the entity. The reports must be made within 30 days of acquisition and contain the following information:

1. Name, address of principal place of business, and address of principal Ohio office.

2. Name, address, telephone number, and country of citizenship of each nonresident alien who owns at least a 10 percent interest in the entity.

3. Location and amount of acreage of real property.

4. Principal business of corporation or entity.

5. Intended use of real property at time of filing.

6. Name of the chairman of governing board, if any, chief executive, if any, and partners, if any.

7. Name of the corporation's or entity's agent in this State.

8. Place of incorporation, if a corporation.

9. Number of persons who own shares of stock or other interests.

Ohio Rev. Code §5301.254 (1979).

C. Nonresident aliens or business entities which acquired real property prior to the effective date of this act, and which otherwise would have been subject to its provisions, must file reports within 1 year after the effective date of this act (March 19, 1979). Ohio Rev. Code §5301.99 (1979).

D. The act also contains provisions requiring persons or entities who are required to report acquisition to also report the sale of property within 30 days after the sale. Ohio Rev. Code §5301.254 (1979).

E. The penalty for violating this act is a fine of not less than $5,000 nor more than an amount equal to 25 percent of the market value of the property. A violation of the act is also a first degree misdemeanor. Ohio Rev. Code §5301.99 (1979).

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a license to do business prior to transacting business in the State (model code disclosures). Ohio Rev. Code §§1703.03, 1703.04 (1978).

B. All corporations must file annual reports (model code disclosures and location and value of property used by the corporation within the State). Ohio Rev. Code §1703.07 (1978).

<u>Oklahoma</u>

I. General landownership and use restrictions:

A. Major--No aliens may own land unless a resident of the State. Alien nonresidents who acquire land by devise, descent, or pur-

chase, where such purchase is made under foreclosure liens, may hold the land but must dispose of it within 5 years of acquiring title, upon penalty of escheat. Okla. Stat. Ann. tit. 60, §§121-123 (1970).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. No corporation shall own real estate outside any incorporated city or town except as such real estate is necessary and proper for carrying on the business for which the corporation has been lawfully incorporated or domesticated in this State. Okla. Stat. Ann. tit. 18, §1.20 (Supp. 1978-79).

B. Foreign corporations must be domesticated prior to transacting business in the State (model code disclosures and an estimate of the value of property to be located within the State in the current fiscal year). Okla. Stat. Ann. tit. 18, §§1.199, 1.228 (1953).

C. Corporations are prohibited from engaging in farming, with a few limited exceptions (e.g. small family corporations). Okla. Stat. Ann. tit. 18, §951 (Supp. 1978-79).

<u>Oregon</u>

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Only citizens and persons who have declared their intention to become citizens may purchase State lands. Oreg. Rev. Stat. §273.255 (1977).

II. Alien reporting requirements: none, but see III.C.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to doing business in the State (model code disclosures). Oreg. Rev. Stat. §§57.655, 57.675 (1971).

B. All corporations must file annual reports (model code disclosures). Oreg. Rev. Stat. §57.755 (1977).

C. All corporations that conduct any farming or that own or lease any farmland must file additional disclosures which include, among other things:

1. Name and business address of each entity that controls 10 percent or more of the voting shares of the corporation.

2. Name of county in which it leases or owns more than 40 acres of farmland, or where it conducts farming operations.

This Act took effect January 1, 1978, and is repealed July 1, 1981. Oreg. Rev. Stat. §57.757 (1977).

Pennsylvania

I. General landownership and use restrictions:

A. Major

1. Aliens may own land not exceeding 5,000 acres nor producing a net annual income of $20,000 or more. Pa. Stat. Ann. tit. 68, §32 (1965 & Supp. 1978-79).

2. A foreign government may not hold land without special permission from the legislature. Pa. Stat. Ann. tit. 68, §21, 1965 & Supp. 1978-79).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Pa. Stat. Ann. tit. 15, §2004 (Supp. 1978-79).

Rhode Island

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures and an estimate of the value of property to be owned within the State in the following year). R.I. Gen. Laws §§7-1.1-100, 7-1.1-103 (1970 & Supp. 1977).

B. All corporations must file annual reports (disclosures nearly identical to those in III.A.). R.I. Gen. Laws §7-1.1-118 (Supp. 1977).

South Carolina

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Aliens and corporations controlled by aliens may not own or control more than 500,000 acres of land within the State. Lands acquired through the foreclosure of mortgages are excluded, provided the excess lands are disposed of within 5 years. S.C. Code §§27-13-30, 27-13-40 (1976).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations must obtain a certificate of authority prior to transacting business within the State (model code disclosures). S.C. Code §33-23-20 (1976).

South Dakota

I. General landownership and use restrictions:

A. Major

1. No nonresident alien may acquire, after July 1, 1979, any interest in agricultural land exceeding 160 acres, except as may be acquired by devise or descent, by enforcement of a lien, by process of law in the collection of a debt, or such as may be held as security for indebtedness. This section does not apply to those persons or governments whose rights to hold land are secured by treaty. §§1, 2 of "An Act to restrict nonresident alien ownership of land" (filed April 12, 1979).

2. Any alien who acquires, after July 1, 1979, in excess of 160 acres of agricultural land by devise or descent, by enforcement of a lien, or by operation of law in collection of a debt shall have 3 years from the date of acquisition to dispose of the property. §§2, 4 of "An Act to restrict nonresident alien ownership of land" (filed April 12,1979).

3. The Department of Agriculture shall monitor for compliance with the Act biannual reports transmitted to the Department pursuant to section 6 of the U.S. Agricultural Foreign Investment Disclosure Act of 1978. If any noncompliance is discovered, the Attorney General shall investigate and initiate legal action if necessary. All agricultural lands held in violation of this Act shall forfeit to the State. §§5, 6 of "An Act to restrict nonresident alien ownership of land" (filed April 12, 1979).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures and an estimate of the value of the property within the State to be owned by the corporation during the following year). S.D. Compiled Laws Ann. §47-8-7 (1967).

B. All corporations must file an annual report (disclosures nearly identical to those in III.A.). S.D. Compiled Laws Ann. §47-9-1 (1967).

C. No corporation shall engage in farming, nor shall any corporation own or acquire agricultural land. S.D. Compiled Laws Ann. §47-9A-3 (Supp. 1977).

<u>Tennessee</u>

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements: Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Tenn. Code Ann. §48-1103 (Supp. 1977).

<u>Texas</u>

I. General landownership and use restrictions:

A. Major--See III.A.

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Corporations may own only that land that is necessary to do business except where the land is acquired through a debt. All surplus land must be sold within 15 years, upon penalty of escheat. Tex. Rev. Civ. Stat. Ann. art. 1302, §§4.01, 4.02 (Supp. 1978).

B. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Tex. Bus. Corp. Act Ann. art. 8.05 (Supp. 1978).

Utah

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclo-ures and an estimate of the value of the property to be owned within the State in the following year). Utah Code Ann. §16-10-106 (1973).

B. All corporations must file an annual report (disclosures nearly identical to III.A.). Utah Code Ann. §16-10-121 (1973).

Vermont

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclo-sures). Vt. Stat. Ann. tit. 11, §2105 (1973).

B. All corporations must file annual reports (model code disclo-sures). Vt. Stat. Ann. tit. 11, §2151 (1973).

Virginia

I. General landownership and use restrictions:

A. Major--none.

B. Minor--Aliens not enemies may acquire, hold, and transmit real property. Va. Code Ann. §§55-1 (1974).

II. Alien reporting requirements: Virginia has passed legislation entitled "Foreign Agricultural Investment Disclosure Act" which has reporting requirements similar to Public Law 95-460, the Agricultural Foreign Investment Disclosure Act of 1978 (AFIDA). Va. Code Ann. §§3.1-22.22 through 3.1-22.27 (1979). However, the Virginia Commissioner of Agriculture has not elected to implement requirements and will rely solely on AFIDA data received through the U.S. Department of Agriculture. Letter from S. Mason Carbaugh, Commissioner of Agriculture, to Leland E. Beale, Jr., Executive Director, Virginia State ASCS Office (April 6, 1979).

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Va. Code Ann. §§13.1-102, 13.1-106 (1978).

B. All corporations must file annual reports (model code disclosures). Va. Code Ann. §13.1-120 (1978).

Washington

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Wash. Rev. Code Ann. §§23A.32.010, 23A.32.050 (1969 & Supp. 1977).

B. All corporations must file annual reports (model code disclosures). Wash. Rev. Code Ann. §23A.08.480 (Supp. 1977).

West Virginia

I. General landownership and use restrictions: none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Corporations holding more than 10,000 acres of land within the State must pay a yearly tax of 5 cents per acre on the land in excess of 10,000 acres. W. Va. Code §11-12-75 (1974).

B. Foreign corporations must pay a higher license tax than domestic corporations. The tax assessment is based upon the amount of property owned within the State, and foreign corporations must file a report (separate from the annual report) disclosing the amount of property owned within the State. W. Va. Code §§11-12-80, 11-12-81 (Supp. 1978).

C. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). W. Va. Code §§31-1-49, 31-1-53 (1975).

D. All corporations must file annual reports (model code disclosures and where property owned within the State is situated of what it consists and the number of acres). W. Va. Code §§31-1-56a (1975).

Wisconsin

I. General landownership and use restrictions:

A. Major--Aliens may hold and acquire land, except:

1. Aliens not residing in the United States are prohibited from holding more than 640 acres of land, unless such land is acquired through inheritance or upon a debt (upon penalty of escheat). Wis. Stat. Ann. §710.02 (West Special Pamphlet 1978).

2. A corporation not incorporated within the United States or a corporation of which more than 20 percent of the stock is owned by nonresident aliens is prohibited from holding more than 640 acres of land, unless such land was acquired through inheritance or upon a debt (upon penalty of escheat). Wis. Stat. Ann. §§710.01, 710.02, 710.03 (West Special Pamphlet 1978).

B. Minor--none.

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. No corporation may own land on which to carry on farming operations. Wis. Stat. Ann. §182.001 (Supp. 1978-79).

B. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosures). Wis. Stat. Ann. §§180.801, 180.813 (1957 & Supp. 1978-79).

C. All corporations must file an annual report (model code disclosures). Wis. Stat. Ann. §180.791 (1957 & Supp. 1978-79).

Wyoming

I. General landownership and use restrictions:

A. Major--none.

B. Minor--All resident aliens not eligible for citizenship under the laws of the United States are prohibited from acquiring an interest in real property, unless a reciprocal right is accorded U.S. citizens in the alien's home country. Wyo. Stat. §34-15-101 (1977).

II. Alien reporting requirements: none.

III. Corporate restrictions and requirements:

A. Foreign corporations must obtain a certificate of authority prior to transacting business in the State (model code disclosure and an estimate of the value of the property within the State to be owned in the following year). Wyo. Stat. §§17-1-701, 17-1-1705 (1977).

B. All corporations must file annual reports (model code disclosures). Wyo. Stat. §17-2-101 (1977).

THE STATE'S EXPERIENCES

In assessing the State legislation affecting foreign investment in real estate, it is important that we look at individual States for their experience in enforcing the laws. Problems or peculiarities the States have encountered may be helpful in devising future information systems.

Most of the laws restricting foreign ownership of real estate are of late 19th century vintage, although several of the States have added significant amendments since that time. These statutes were a result of a strong anti-alien landholding feeling that was pervasive throughout this country during the late 19th and early 20th centuries. 6/

The record of enforcement in these States varies from no recorded violations in some States (e.g., Illinois) to a few old reported cases in others (e.g., New Hampshire). It appears that few of the States have been involved in any recent enforcement efforts. Most of the attorneys general are not actively looking for violators, although they usually will take action if a violation is brought to their attention.

The alien reporting laws (as distinct from laws restricting ownership) all are recent enactments, and although they may be a result of concerns similar to those present across the country during the late 19th century, their goal is entirely different. They are designed to provide information about the nature and extent of alien real estate investment in the State. Ostensibly, this will assist the State in deciding whether restrictions on foreign investment would be wise or, if restrictions are in existence, whether they are sufficient.

Six States--Arkansas, Iowa, Minnesota, North Dakota, Nebraska, and Ohio--have such laws in existence. 7/ The Nebraska reporting law

6/ Anderson, A Survey of Alien Land Investment in the United States, Colonial Times to Present, in Economic Research Service, U.S. Dept. of Agriculture, Foreign Investment in U.S. Real Estate 24-25 (1976).

7/ The reporting laws of Arkansas, North Dakota, and Ohio have only recently gone into effect and there are no data yet available on their effectiveness. Virginia also has a reporting law, but it will not be implemented, if ever, until some undetermined future date (see Virginia summary).

requires corporations owning agricultural land to disclose the name and address of each nonresident alien owning 10 percent or more of the stock of the corporation. As a complement to the reporting law, Nebraska bans the ownership of most agricultural land by nonresident aliens. Nebraska also prohibits alien corporations and U.S. corporations controlled by aliens from owning agricultural land.

Theoretically, then, the only foreign real estate investment allowed in Nebraska would be through a corporation, and much of that would be reported in the corporate farm reporting law. In reality, out of 2,400 corporate farm reports filed in 1978, only one showed nonresident alien ownership. 8/ The Secretary of State's office did not attribute this to a lack of foreign investment, but to a huge loophole in the reporting law. Corporations can legally avoid the nonresident alien disclosure requirement by owning the land through a nominee or by adding an extra corporate layer. Those persons in the Nebraska Secretary of State's office who were involved with the reporting law program unanimously opined that the law was ineffective for determining the extent of foreign investment in Nebraska real estate.

Minnesota's present alien land law, which has been in effect since May 1977, also takes a two-pronged approach. Minnesota prohibits (with a few exceptions) nonresident alien acquisition of agricultural land, and requires existing and exempted nonresident alien agricultural landholders to make annual reports to the Commissioner of Agriculture. It appears that the reporting system is reasonably effective in achieving its goal--an inventory of nonresident alien agricultural landholdings.

The Minnesota Attorney General's office currently is investigating three cases of alleged illegal alien ownership. The assistant attorney general assigned to this area felt that while there probably were other violations existing, unreported foreign ownership of agricultural land is not extensive in Minnesota. Apparently, public knowledge of the foreign ownership restriction has been helpful in identifying possible violators.

Iowa probably has made the most extensive effort of any State in attempting to gather information about foreign ownership of agricultural land. In conjunction with its comprehensive reporting scheme, Iowa generally has prohibited the ownership of more than 640 acres by nonresident aliens.

However, Iowa has just passed legisltion that replaces its restrictions on nonresident alien ownership of land and most of the accompanying reporting requirements with more stringent restrictions and new reporting requirements. 9/ The new legislation does not become effective

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8/ These figures include all corporate farm reports filed through Nov. 30, 1978.

9/ *See* the Appendix in this chapter for a detailed analysis of the Iowa experience. *See also* the State-by-State Survey.

until January 1, 1980. Therefore, it is difficult to predict how effective it will be in achieving the legislature's goal of barring acquisition of agricultural land by nonresident aliens and compiling data on the amount and type of existing nonresident alien ownership of farmland.

It is clear that the general corporate reporting laws, existing in one form or another in all States, do not provide extensive or reliable information on foreign ownership of real estate. The potential value, if any, of this type of information is undermined by the type of information-gathering systems in many States. Many States neither computerize their corporate records nor separate them into categories of alien and U.S. corporations. Thus, even if potential valuable information exists in a State's corporate records, it may be difficult to extract it.

It should also be noted that the general corporate laws in many States are such that restrictions on nonresident alien ownership of land might be evaded through corporate manipulations. Thus, even if a State includes in its restrictions on nonresident alien ownership of real estate, a restriction on nonresident alien controlled corporate ownership of land, nonresident aliens may be able to evade the intent of the law (legally or illegally depending on the statute) through corporate layering or other manipulations. Even if these manipulations are illegal, they may be very hard to detect.

APPENDIX

RESTRICTING ALIEN OWNERSHIP OF FARMLAND: THE IOWA EXPERIENCE

Neil E. Harl */

In 1979, Iowa came full circle in the quest to limit the ownership of agricultural land by nonresident aliens (and by some resident aliens). In a period of 133 years, Iowa moved from a highly restrictive rule limiting ownership of land by aliens to a relatively nonrestrictive stance and, in 1979, back to substantial limitations on nonresident alien ownership rights in farmland.

The common law heritage generally prohibiting landownership by aliens was modified by a provision in the Iowa constitution, as initially adopted, permitting resident aliens to own land and by important statutory enactments in 1858 and 1868, which eased the rules for landownership by nonresident aliens. The trend back toward a more restrictive posture got underway in 1888 with a 320-acre limitation on acquisition of real property outside the limits of cities by nonresident aliens. In 1965, that limit was increased to 640 acres. A more restrictive attitude returned in 1975 with imposition of the first reporting requirement to be imposed by any State in the United States on acquisition of agricultural land by nonresident aliens. The reporting rules were tightened in 1978 to require disclosure of beneficial as well as legal ownership interests in agricultural land. In 1979, a complete ban was enacted by the Iowa General Assembly on ownership of agricultural land by aliens other than "permanent resident aliens" except for a limited right to hold land for eventual nonfarm purposes.

FORMULATING THE IOWA LIMITATIONS

Common Law Foundation

The legal heritage of Iowa is clearly that of the English common law. For States following the common law tradition, substantial attention is given to rules adduced from previously decided cases. Such attention to prior law assures a modicum of certainty, stability, and uniformity to

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developing legal systems and produces a less seriated path of legal development than would be the case in the absence of reliance on previously decided cases as authority for matters in litigation.

Perhaps in no other area of law has the common law tradition been more influential than in the development of concepts of property. The English common law provided a well-developed framework for real and personal property ownership and transfer by the time of settlement of the New World colonies in the 17th century. From the time of territorial status through statehood in 1846, Iowa law was shaped and formed by common law concepts.

At common law, it has often been written, aliens could not acquire good title to land[1/] either by purchase or inheritance except with the King's approval.[2/] The Iowa Supreme Court, in several cases, acknowledged the common law rule that an alien could not acquire land by purchase and give good title to a vendee.[3/] Land could be purchased by aliens, but it would escheat to the State through a proceeding by "office found," in which alienage was judicially determined.

The common law rule was abolished by statute in England in 1870.[4/] However, by that time the common law concept of limitations on real property ownership by aliens was well imbedded in the jurisprudential systems of the States adhering to the common law tradition.

The reasons for such limitations at common law were palpably reasonable. Commencing in 1066 in England with the Battle of Hastings, the King owned all real estate in the country. In an effort to assure continuing control over the land in the kingdom and at the same time secure support for the King and the King's family, a system of feudal ownership was developed. Lands were granted to lords in return for a commitment to furnish the King with specified goods, such as grain, or designated services, for example service in the King's army. The lord's promise was secured by an oath of loyalty to the King. The lords, in turn, sublet or *subinfeudated* the land in parcels to others who agreed to provide goods or services. With the entire system of landownership and control based upon allegiance to the King and others in the chain of ownership, there was little place for an alien who would have allegiance elsewhere.[5/]

Iowa Constitutional Limitation

Much of the early American land law was based upon the English common law. In some States, the common law rule excluding aliens from owning

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1/ *See generally*, Sullivan, *Alien Land Laws: A Re-Evaluation*, 36 Temp. L. Q. 15, 16 (1962).

2/ *See* King v. Ware, 53 Iowa 97, 99 (1880)(dictum); Furenes v. Mickleson, 86 Iowa 508, 509-10, 53 N.W. 416, 417 (1892); 2 Blackstone, Commentaries 249-50 (1766).

3/ *See*, *e.g.*, Purczell v. Smidt, 21 Iowa 540 (1866).

4/ Naturalization Act of 1870, 33 & 34 Vict., ch. 14, § 2.

5/ *See* 2 Blackstone, *supra* note 2, at 249.

real property was so strong that landownership was limited to citizens of that State.[6] Excluding citizens of other States from landownership violates the privileges and immunities clause of the U.S. Constitution, however.[7]

It was in that general setting that Iowa adopted, with its first constitution, a provision which, by its terms, purported to confer greater rights upon aliens than were applicable at common law.[8] The Iowa constitution specifies:

> Foreigners who are, or may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and descent of property as native born citizens.

Although it has been argued that the above provision could have been interpreted more broadly, the Iowa Supreme Court in Stemple v. Herminghouser adopted a relatively narrow view of the provision in a decision rendered soon after the constitution became effective.[9] The Iowa court construed the constitutional provision as enabling aliens actually resident in Iowa to enjoy full ownership rights in land.[10] The court acknowledged the common law rule and pointed out that the Ordinance of 1787 and the statutes of the territory of Iowa did not alter the rule of the common law.[11] The Iowa court perceived the reason for the Iowa constitutional provision as encouraging the immigration and settlement of aliens and securing for them the possession and inheritance of real property and concluded that, in furtherance of those objectives, "this wholesome provision was engrafted into the fundamental law of the state."[12] The Iowa court concluded with the observation that "if they become residents of Iowa, they then enjoy the same rights as native born citizens."[13]

Stemple v. Herminghouser involved the issue of whether children who were nonresident aliens could inherit land in Iowa. The Iowa Supreme Court held that the Iowa constitution did not authorize such a right. Justice Green, in an impassioned dissent, wrote:

> To assume that because the legitimate child and heir of an intestate be born outside of certain geographical limits, he thereby forfeits all inheritable rights, which naturally and in strict justice belong to him, is without any foundation in reason, and an outrage upon the equality and rights of men. No doubt such a policy would be readily

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6/ See Morrison, Limitations of Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 623-24 (1976).
7/ U.S. Const. art. IV, § 2.
8/ Iowa Const. art. I, § 22.
9/ 3 Greene 408 (Iowa 1852).
10/ Id.
11/ Id. at 410 (dictum).
12/ Id.
13/ Id. at 411.

> endorsed by the selfish dictates of crowned heads, to which the property would escheat....It is inconsistent with the great truths and principles of right, upon which most of the common law is founded. It is one of the few remaining despotic features of that law which is repulsive to American institutions, and which should receive no countenance from American courts."[14]

Thus, it appears that, as of 1852, Iowa did not grant to aliens living beyond the State's borders the right to take or hold real property in Iowa.[15] Whether such discrimination against aliens resident elsewhere in the United States was in keeping with the equal protection and due process clauses of the 14th amendment to the U.S. Constitution adopted later (in 1868) appears not to have been raised after the amendment became effective.

Subsequent Legislation and Court Interpretations

Following *Stemple* v. *Herminghouser*,[16] the Iowa Legislature sought to clarify, and, arguably, enlarge the rights of aliens not resident in Iowa to hold and transfer real property. In legislation adopted in 1858,[17] the Iowa General Assembly specified that:

> ...all Aliens residing in the United States who shall have made a declaration of their intention to become citizens of the United States...and all Alien residents of this State shall be capable of acquiring real estate in this State by descent or purchase....
>
> It shall be lawful for every Alien who except for his alienage would be cable (sic) of acquiring real estate by devise descent (sic) from any person hereafter dying, capable at the time of the death, of holding real estate in this State, to acquire real estate in this State by devise or descent...as if they were citizens of the United States....
>
> It shall be lawful for every Alien who were it not for his alienage would be capable of acquiring real estate by purchase in this State from any person capable at that time of holding an absolute title to real estate in this State, *Provided*, that such alien shall in good faith, sell and convey the same within ten years from the date of his said purchase...to some person capable at the time of acquiring and holding an absolute title to real estate under the laws of this State....

14/ *Id.* at 412.
15/ *Id.*
16/ *Id.* at 410.
17/ Acts of the 12th Iowa General Assembly, ch. 65 (1858).

The language quite clearly was meant to enlarge the rights of aliens residing in the United States but outside Iowa and, arguably, to enlarge the rights of aliens residing outside the United States. The Iowa Supreme Court, however, laboring under the strong common law rule to the contrary, saw it otherwise.

In Krogan v. Kinney[18/] decided in 1863, the Iowa Supreme Court faced the question whether nonresident alien intestate heirs could inherit real estate in Iowa. After reviewing the common law rule, and noting that the 1858 statute was only intended by the Iowa legislation to carry out more fully the provision in the Iowa constitution, the Iowa court held that nonresident aliens could not inherit land in Iowa. This holding was in spite of statutory language that it was lawful:

> ...for every Alien who except for his alienage would be cable (sic) of acquiring real estate by devise descent (sic) from any person hereafter dying, capable at the time of the death, of holding real estate in this State, to acquire real estate in this State by devise or descent... as if they were citizens of the United States.[19/]

In a case decided 2 years later, Rheem v. Robbins,[20/] the Iowa Supreme Court again interpreted the 1858 act which the court referred to as ambiguous. The court noted that the 1858 legislation was intended to limit the right to acquire and hold land to aliens who were resident within the United States and was not intended to grant to nonresident aliens such rights except "in the single instance of a devise by will of a resident citizen to a foreign alien, who may become a devisee...provided he will subsequently remove to and become a resident of the State."[21/] The plaintiffs in Rheem v. Robbins were intestate heirs and, therefore, were not permitted to acquire Iowa real property by intestacy.[22/]

The following year, the Iowa Supreme Court decided Purczell v. Smidt[23/] which involved the validity of a conveyance from nonresident aliens (who had acquired the land by purchase) to the plaintiffs. The court held that (1) the 1858 legislation embraced "aliens resident in the United States who have declared their intention to become citizens, and residents of this State," and conferred upon every alien the right to acquire real estate by devise or descent but not by purchase except where the land was acquired "from any person holding an absolute title, upon condition that he in good faith sells the same within ten years, to a person capable of holding an absolute title"; (2) agreed that a nonresident alien could convey good title to the land in question; and (3) overruled Krogan v. Kinney[24/] and Rheim v. Robbins.[25/]

18/ 15 Iowa 242 (1863).
19/ Acts of 7th Iowa General Assembly, ch. 65 § 2 (1858).
20/ 20 Iowa 45 (1865).
21/ Id. at 48-49 (dictum).
22/ Id.
23/ 21 Iowa 540 (1866).
24/ 15 Iowa 242 (1863).
25/ 20 Iowa 45 (1865).

At that point, it appeared that the 1858 legislation was given effect and that resident aliens, and nonresident aliens within limits, could, in fact, acquire and dispose of real estate in Iowa.

In an apparent attempt to make the Iowa law even more clear as to landownership right of resident aliens and to enlarge further the rights of nonresident aliens, the Twelfth General Assembly adopted a measure, effective May 6, 1868, that appeared to be designed expressly to abolish the distinctions among citizens, resident aliens and nonresident aliens.[26] That provision stated:

> That all aliens, whether they reside in the United States or in any foreign country, may in this state acquire, hold, and enjoy property, personal or real, or any interest therein, by purchase, gift, devise, or descent, and may convey, mortgage, or devise the same in a like manner, and with the same effect, as if such aliens were native-born citizens of the United States. And all property, real or personal, situated in this State, and belonging to a foreigner, shall if not disposed by will, after the death of the owner, descend to the heirs of such foreigner, whether the same reside in the United States or in any foreign country. Such heirs shall be the same as the heirs-in-law of native-born citizens....All the distinctions heretofore made by laws between citizens and resident and non-resident foreigners, in reference to the acquisition, possession, enjoyment, and transfer of property, real and personal, by conveyance, gift, devise, descent or otherwise, are hereby abolished....All laws conflicting with these provisions are hereby abolished.[27]

The language in the 1868 enactment was clearly designed to abrogate the common law rule and establish the right of resident and nonresident aliens to own and dispose of real property. It should be kept in mind that, at the time of the 1868 legislation, few individuals other than native-born Americans had been residents of the State for more than three decades.

The clarity of the 1868 legislation notwithstanding, the Iowa Supreme Court in Brown v. Pearson,[28] decided in 1875, took a restrictive view of the right of aliens to acquire real property. The court recited that Iowa law had been interpreted as not conferring upon nonresident aliens the capacity to inherit real property and cited Krogan v. Kinney[29] and Rheim v. Robbins[30] as authority. The Iowa Supreme Court, which 9 years earlier had overruled those two cases in Purczell v. Smidt[31] then proceeded to overrule Purczell v. Smidt on the ground that any other holding would have an adverse effect on land titles.[32] Concern about

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26/ Acts of 12th Iowa General Assembly, ch. 193 (1868).
27/ Id.
28/ 41 Iowa 481 (1875).
29/ 15 Iowa 242 (1863).
30/ 20 Iowa 45 (1865).
31/ 21 Iowa 540 (1866).
32/ 41 Iowa 481 (1875).

land titles prompted the Iowa court to overturn its own precedent and ignore two legislative enactments by the Iowa General Assembly.

The state of the Iowa law, in the mold of Brown v. Pearson,[33/] was confirmed 5 years later in King v. Ware.[34/] That case involved the purchase of land by a nonresident alien from the U.S. Government. The nonresident alien owner died and children of the decedent who were nonresident aliens were not permitted to inherit the decedent's Iowa land. The property passed to those children who were residents (and citizens) of Iowa.

This saga, spanning less than 20 years of early Iowa history, is an example of the then prevailing rule of statutory construction that statutes in derogation of the common law should be construed narrowly.[35/]

The Iowa Acreage Limitation

With the rapid pace of settlement of the Midwest and Great Plains States in the 1870's and 1880's came renewed concern about the rights of nonresident aliens as landowners.[36/] To a considerable extent, the problem of nonresident alien investment up to that time had been one of resolving the rights of nonresident family members to inherit land owned by resident (or nonresident) decedents. Relatively little mention had been made of concerns about limiting the rights of nonresident aliens as investors.

However, with reported acquisitions of land by foreign investors, some by English nobility, came fears that foreign investment might alter the character of tenure relationships in the developing areas and that communities might become economic colonies of foreign governemnts.[37/] One specific concern was that foreign investors might try to establish themselves as landlords in the European style.[38/]

In apparent response to such concerns, several States and the Federal Government acted to limit nonresident alien investment (in territorial lands, grazing lands, and mineral rights). The Territorial Land Act of 1887[39/] imposed limitations on landholding in the organized territories except by farmers holding immigrant status who had applied for citizenship. The key section of that enactment provided that:

33/ Id.

34/ 53 Iowa 97 (1880).

35/ This attitude was cogently described by Sir Frederick Pollock who observed that it "cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds." Pollock, Essays in Jurisprudence and Ethics 85 (1882).

36/ See generally Sullivan, supra note 1, at 30-32.

37/ See Sullivan, supra note 1, at 31-32.

38/ Morrison, supra note 6, at 625.

39/ 48 U.S.C. §§ 1501-1507 (1976). Later enactments dealt with alien landownership in the District of Columbia and the then Territory of Hawaii. 48 U.S.C. §§ 1508-1512 (1976).

> No alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States...shall acquire title to or own any land in any of the territories of the United States except as hereinafter provided. The prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.[40]

Federal law also limited (and still does) the acquisition by aliens of grazing rights,[41] mineral deposits[42] and homesteading right.[43]

Several States, including Iowa, adopted legislation in the late 19th century, restricting the landownership rights of nonresident aliens.[44] The Iowa legislation was enacted in 1888.[45]

The 1888 change in Iowa law repealed the earlier statutory provisions attempting to enlarge the ownership rights of aliens in land and moved Iowa back toward the original common law rule as to nonresident aliens. The general rule of the 1888 legislation was that:

40/ 48 U.S.C. § 1501 (1976).

41/ 32 C.F.R. § 4110.1(a) (1978) (applicant must be "a citizen" of the United States or have properly filed a valid declaration of intention to become a citizen or a valid petition for naturalization).

42/ See Mining Law of 1872, 30 U.S.C. § 22 (1976) ("except as otherwise provided, all valuable mineral deposits in lands belonging to the United States...shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such...."). The Mineral Leasing Act of 1920 provided that mineral deposits covered by that legislation were subject to disposition "to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States...." 30 U.S.C. § 181 (1976). See 30 U.S.C. § 1015 (1976) (leases for geothermal steam resources may be issued only to "citizens of the United States, associations of such citizens, corporations organized under the laws of the United States or of any State or the District of Columbia, or governmental units...."); 43 U.S.C. § 687a (1976) (right to purchase public land in Alaska granted to "any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory....").

43/ 30 U.S.C. § 161 (1976) ("every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such...shall be entitled to enter...unappropriated public lands....").

44/ See generally U.S. Public Land Law Review Commission, History of Public Land Law Development 482-83 (1968).

45/ Acts of 22d Iowa General Assembly, ch. 85 (1888).

> Nonresident aliens or corporations incorporated under the laws of any foreign country, or corporations organized in this country one half of whose stock is owned or controlled by non-resident aliens, are hereby prohibited from acquiring title to or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise....[46]

The Iowa legislation adopted in 1888 also permitted a nonresident alien to:

> acquire and hold real property to the extent of three hundred and twenty (320) acres, or city property to the amount of $10,000 in value, providing that within five years from the date of purchase of said property the same is placed in the actual possession of a relative of such purchaser. The occupant being related to such owner within the third degree of kindred or the husband or wife of such relative, and further provided that such occupant become a naturalized citizen within ten years from the purchase of said property....[47]

The Iowa statute empowered nonresident aliens then owning land in Iowa to dispose of the land to bona fide purchasers.[48] The legislation was made inapplicable to aliens resident within the State of Iowa, paralleling the judicial interpretation of the Iowa constitution relative to alien landownership rights.[49]

The Iowa statute was amended in 1896 to eliminate the requirement that lands under the 320-acre limitation and within cities held by a nonresident alien must be conveyed within 5 years to a relative "occupant" under penalty of escheat to the State, to eliminate the $10,000 limit on "city property" that could be acquired and to increase from 10 to 20 years the period land could be held by the "widow and heirs of aliens" by descent or devise without escheat.[50] With only minor revisions, the Iowa statutory provision remained unchanged until 1965. At that time, and with little apparent fanfare, the 320-acre limitation on nonresident alien-ownership "in the name of one person, or any stock in any corporation for pecuniary profit" was increased to 640 acres.[51] The language also was amended to clarify the limitation as to permissible corporate ownership, with the statute providing as follows after the amendment:

> Nothing...shall prevent aliens, or corporations organized under the laws of any foreign country, or corporations organized in this country, one-half or more of the stock of which is owned or controlled by nonresident aliens, from having title to or acquiring property of any kind

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46/ Id. § 1.
47/ Id. § 2.
48/ Id. § 5.
49/ See Iowa Const. art. I, § 22.
50/ Acts of 26th Iowa General Assembly, ch. 104 (1896).
51/ Acts of 61st Iowa General Assembly, ch. 416 (1965).

within the corporate limits of any city or town in the state, and lands not to exceed six hundred forty acres outside the corporate limits of any city or town in the state, or from alienating, mortgaging or devising the same.[52]

In the years following the 1965 amendment, as the public interest in nonresident alien investment increased and as inquiries by those representing potential nonresident alien investors became more numerous, concern was voiced over the acreage that could be owned in the aggregate outside cites and towns by nonresident aliens, their families, and their controlled entitites. No authority exists on those points, although it was generally believed that such nonresident alien family member could own not more than 640 acres and that each corporation organized under the laws of a foreign country and each corporation organized in the United States, one-half or more of the stock of which was owned or controlled by nonresident aliens, could own no more than 640 acres.

THE IOWA RESPONSE IN THE MODERN ERA

Reporting Requirement

In the period following the oil embargo of 1973, concern was expressed in Iowa, as it was in many States, about the rise of liquidity in the hands of members of the Organization of Petroleum Exporting Countries (OPEC). Specifically, the fear was expressed that a substantial part of the funds might be invested in real estate, including Iowa farmland. Notwithstanding research findings that OPEC investors were not among the successful bidders for Iowa farmland,[53] concern about the effects of higher levels of nonresident alien investment in farmland continued to be expressed, at least politically, in the years following 1973. In late 1974, the U.S. Congress enacted the Foreign Investment Study Act of 1974,[54] which set in motion a substantial research and data-gathering effort directed toward portfolio investment as well as direct investment in U.S. real estate.[55]

Another policy concern that attracted political attention in the early 1970's was the fear that corporations were acquiring agricultural land, increasing their share of agricultural production, threatening the social and economic structure of agriculture, and endangering the centerpiece of that structure, the family farm.[56] Although often expressed without

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52/ Id.

53/ See Currie, Boehlje, Harl, and Harris, Non-Resident Alien Investment Activity in Iowa Farmland: A Preliminary Analysis, in 8 U.S. Dept. of Commerce, Report to the Congress, Foreign Direct Investment in the United States, at L-29 (1976).

54/ 15 U.S.C. § 78b (1976).

55/ See U.S. Dept. of Commerce, Foreign Direct Investment in the United States: Report to the Congress, Vols. 1-9, 1976.

56/ See, e.g., Ray, The Corporate Invasion of American Agriculture (1968).

such qualifications, the problem seemed to relate to the movement of large, publicly held corporations into agriculture, in contrast to the small, closely held corporations that have steadily increased in numbers in recent years as the organizational choice of a growing segment of larger family farm operations.[57/]

In 1975, the Iowa House of Representatives approved a bill[58/] by an overwhelming vote that would have banned corporations from owning farmland or engaging in farming in Iowa. The Iowa Senate, after extended discussion within the Senate Agriculture Committee, perceived the problem of corporate involvement in American agriculture as posing less of a crisis than was evidenced by the House of Representatives' action. The Iowa Senate took the position that the most pressing need was to improve the data base for policy decisions as to not only corporate activity in farmland ownership and operation of farm businesses but also to include farming activity by limited partnerships (which had gained visibility nationally as the investment vehicle of preference for tax shelter investments) and nonresident alien investment activity. The compromise result, passed both houses of the General Assembly in 1975 and signed by the Governor, required annual reporting by corporations, limited partnerships, and nonresident aliens and placed a 1-year moratorium on acquisition of "additional agricultural land" by corporations other than "family farm corporations" and "authorized farm corporations."[59/] The legislation also prohibited any processor of beef or pork with wholesale sales of $10 million, or more from owning, controlling, or operating a feedlot in Iowa.

In subsequent legislation, the 1-year moratorium was extended to August 15, 1980[60/] and made permanent in 1979.[61/] In 1977, the moratorium was made applicable to acquisition of agricultural land by trusts other than "family farm trusts," "authorized farm trusts," and testamentary trusts.[62/] The expansion of the moratorium to include trusts was triggered by the highly publicized proposal known as Ag Land I, which would have involved purchase of agricultural land with pension and profit-sharing funds administered by a Chicago bank.[63/]

57/ See Harl, The Family Corporation, in Size, Structure and Future of Farms, (Ball and Heady eds. 1972); Harl, Influencing the Structure of Agriculture, 42 J. of the Amer. Soc. of Farm Managers and Rural Appraisers 59 (1978); Harl, Public Policy and the Control of Agricultural Production, 60 Am. J. of Agr. Econ. 844 (1978).

58/ H.F. 215, 66th Iowa General Assembly (1975).

59/ Acts of 66th Iowa General Assembly, ch. 133 (1975), now Iowa Code ch. 172C (1979).

60/ See Iowa Code § 172C.4 (1979).

61/ H.F. 451, Acts of 68th Iowa General Assembly (1979).

62/ Iowa Code §§ 172C.4, 172C.1(10), (11), (12), (13) (1979).

63/ See Harl, Statement for Family Farms and Rural Development Subcommittee on Agriculture, U.S. House of Representatives, Feb. 18, 24, 1977, in Staff of House of Representatives Comm. on Agriculture, 95th Cong., 1st Sess., Hearings Before the Subcomm. on Family Farms, Rural Development and Special Studies of the House Comm. on Agriculture 360-368 (Comm. Print 1977).

The 1975 Iowa legislation required nonresident aliens "owning or leasing agricultural land, or engaged in farming outside the corporate limits of any city" in the State to file an annual report with the Iowa Secretary of State.[64] The report included the nonresident alien's name, address, residence, and citizenship; a declaration of the type of agricultural activity engaged in by the nonresident alien; the acreage and location of agricultural land owned outside the corporate limits of any city in the State as of the end of the preceding calendar or fiscal year, listed by township and county; the approximate number and kind of livestock or poultry owned, contracted for, fed, or kept, and the approximate number of acres used for each agricultural crop, fruit, or other horticultural product grown or contracted for during the preceding calendar or fiscal year; the number of acres owned and operated; the number of acres leased to and the acreage leased by the nonresident alien; the crop or livestock shares to which the nonresident alien is entitled under any lease; and the name of any individual or firm representing the nonresident alien in the State as agent or other representative.[65] At the time of its enactment, the Iowa reporting requirement for nonresident alien activity in farmland was the only such requirement in the United States.

In addition to reports by nonresident alien individuals involved directly in owning or leasing agricultural land or in farming operations, the Iowa reporting requirement also specified that similar reports were to be filed by those acting in a fiduciary capacity (such as a trustee) for a nonresident alien individual if the fiduciary "holds agricultural land ...outside the corporate limits of any city" in the State.[66] Moreover, reports were required of nonresident aliens who were beneficiaries under a fiduciary relationship in which agricultural land was held.[67]

For any reporting system, the extent to which those obligated to report are advised of the requirement is an important determinant of success of the system in accomplishing the reporting objectives. The problem was perceived as especially acute for reporting involving nonresident alien owners of farmland or interests in farmland, inasmuch as the usual means of mass notification, might not reach a significant proportion of non-resident aliens, and it was believed that not all nonresident aliens were represented locally by agents who could be counted upon to apprise their principals of the reporting requirement. As was the case in every State, Iowa had not maintained a registry at either the State or county levels of nonresident aliens owning agricultural land or engaging in agricultural activity or of fiduciaries involved in such activity on behalf of nonresident aliens.

Therefore, in an effort to use indirect means to ascertain the identities of nonresident aliens owning agricultural land or holding interests in agricultural land, the Iowa legislature imposed a reporting requirement on the county assessors to provide to the Secretary of State, annually, "the name and address of every corporation, nonresident alien and trust

64/ Iowa Code § 567.9 (1979).
65/ Id.
66/ Id. § 172C.7.
67/ Id. § 172C.8(3).

owning agricultural land in the county as shown by the assessment rolls of the county."[68] County assessors were directed to provide the reports under the assumption that assessors, as a group, were the most knowledgeable individuals in the State relative to ownership of agricultural land.

Upon receipt of the lists from the county assessors, the Secretary of State was to send to each individual and firm so identified forms for the required report on landownership and agricultural activity. Willful failure to file required reports (for beneficiaries and fiduciaries)[69] or the willful filing of false information was punishable by a fine not to exceed $1,000 and $100 per day after 30 days from receipt of notice of failure to file.[70]

Summaries of the statistics from the reports were published annually by the Secretary of State. The data for the 3 years reported in 1976, 1977, and 1978 are included in table 1. For each year, the data represent the situation existing as of the previous December 31.

Table 2 shows the type of agricultural operations engaged in by nonresident alien investors.

Mandatory Recordation and Disclosure of Beneficial Interests

One shortcoming of the Iowa reporting requirement enacted in 1975 to ascertain nonresident alien activity in farmland was that beneficial ownership interests (as opposed to legal ownership interests) would not necessarily be identified. Beneficial ownership includes interests of partners in general or limited partnerships, shareholders in corporations, or beneficiaries in estates or trusts.[71] Thus, legal or record title to real estate may be held by a general or limited partnership, corporation, trust, or estate but with beneficial ownership residing in the individuals receiving the ultimate benefits from the property, which could include nonresident alien individuals.

For those wishing to create a chain of beneficial ownership, with respect to which a single State would face substantial legal obstacles in forcing disclosure of beneficial interests, the possibilities are almost limitless. Thus, investors who are citizens of a foreign country could form a limited partnership in State A, which creates a trust in State B, which

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68/ Iowa Code § 172C.12 (1979).

69/ The penalty section is in ch. 172C of the Iowa Code (1979) along with the requirement for report-filing by nonresident alien beneficiaries and fiduciaries for nonresident aliens. The reporting requirement for nonresident alien individuals is found in § 567.9 of the Iowa Code (1979), which does not impose penalties for failure to file reports.

70/ Iowa Code § 172C.10 (1979).

71/ *See generally* Zumbach & Harl, *Anonymity and Disclosure in Ownership Recording Systems*, in 8 U.S. Dept. of Commerce, Report to the Congress, Foreign Direct Investment in the United States, at L-141 (1976).

Table 1--Characteristics of nonresident aliens involved in agricultural activities in Iowa as reported in 1976-78

	1976	1977	1978
Number reporting	18	23	27
Total acres owned and operated	1,845	2,159	2,813
Total acres leased to others	4,122	4,620	5,968
Number leasing to others on cash basis	3	2	4
Acres leased from others	0	103	95

Source: Reports, Iowa Secretary of State, Statehouse, Des Moines, Iowa.

Table 2--Nature of agricultural operations by nonresident aliens in Iowa as reported for 1976-78

	1976		1977		1978	
	No. reporting	Volume	No. reporting	Volume	No. reporting	Volume
		(Number)		(Number)		(Number)
Livestock						
Poultry	0	0	0	0	0	0
Cattle	3	153	3	150	3	151
Hogs	0	0	2	170	1	392
Sheep	0	0	0	0	0	0
Other livestock	0	0	0	0	0	0
		(Acres)		(Acres)		(Acres)
Crops						
Corn	14	3,376	21	4,027	21	4,741
Soybeans	10	1,190	14	1,386	14	1,419
Oats	0	0	0	0	0	0
Hay	0	0	0	0	0	0
Other crops	0	0	0	0	0	0

Source: Reports, Iowa Secretary of State, Statehouse, Des Moines, Iowa.

forms a corporation in State C, which purchases real estate in State D. If State D, without Federal assistance, imposes a requirement that beneficial ownership interests must be disclosed, the State would have such limited means to force compliance with respect to out-of-State entities as to essentially render the requirement one of voluntary cooperation by the parties.72/ The expected outcome is less-than-complete reporting.

72/ Zumbach & Harl, *supra* note 71, at L-148-152.

A reporting system based upon Federal law with a firm constitutional foundation (such as the commerce power)73/ would face far fewer problems in ensuring disclosure of beneficial interests and, in addition, would assure uniformity of data for the 50 States.74/ However, such a Federal system was not in place in early 1978, when the Iowa General Assembly undertook a review of the problem of disclosure of beneficial interests.75/

The approach adopted by the Iowa General Assembly, to become effective July 1, 1979, was to require (1) the mandatory recordation of every conveyance or lease of agricultural land, except for leases not to exceed 5 years' duration, made on or after July 1, 1979,76/ and (2) disclosure of beneficial ownership by nonresident aliens in entities acquiring interests in agricultural land by conveyance or lease of greater than 5 years' duration.77/ Beneficial ownership was defined to include interests held by nonresident aliens directly or indirectly holding or acquiring a 10-percent or greater share in a partnership, limited partnership, corporation, or trust or through two or more such entities.78/ The term also included interests held by all nonresident aliens if, in the aggregate, nonresident alien individuals held or acquired 25 percent or more of a partnership, limited partnership, corporation, or trust.79/

Under the Iowa procedure, disclosure was to be achieved at the time of recordation of a conveyance or lease (of more than 5 years' duration) to a nonresident alien as grantee or lessee, by the filing of an affidavit, as a precondition of recordation of the document.80/ The affidavit was to show the name, address, and citizenship of the nonresident alien. In addition, if the grantee or lessee was a general or limited partnership, corporation, or trust with beneficial owners who were nonresident aliens, the affidavit was to state the names, addresses, and citizenship of the nonresident alien individuals who were the beneficial owners of the entities.81/ An exception was created for general or limited partnerships, corporations, or trusts registered with the U.S. Securities and Exchange Commission (SEC).82/ In that event, only the fact of such registry needed to be shown on the affidavit. Such registration with

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73/ U.S. Const. art I, § 8.

74/ Zumbach & Harl, supra note 71, at L-152-155.

75/ A limited disclosure requirement was enacted by the U.S. Congress in late 1978. See Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C.A. §§ 3501-3508 (Supp. 1979). The Act requires disclosure, inter alia, by entities organized or created in the United States in which "a significant interest or substantial control" is directly or indirectly held by foreign persons. 7 U.S.C.A. § 3508(3)(C) (Supp. 1979).

76/ See Iowa Code § 558.44 (1979).

77/ Id.

78/ Iowa Code § 567.10(2) (1979).

79/ Id.

80/ Id.

81/ Id.

82/ Id.

the SEC reveals the identities of shareholders owning more than a 10-percent interest in "any class of an equity security (other than an exempted security)...."83/ Failure to record a conveyance or lease, as required, within 180 days is punishable by a fine not to exceed $100 for each day of violation.84/

Few States other than Iowa have sought to impose a mandatory recordation requirement for deeds and long-term leases:

(1) For real property located outside political subdivisions, Alaska requires recordation of transfers before January 1 of the year following transfer.85/ Recordation of direct but not indirect or beneficial ownership transfers is required. Failure to record is punishable by a $10 penalty.86/

District judges and magistrates are required to file with the State Commissioner of Commerce a copy of each conveyance recorded which contains a statement that the property is conveyed to a nonresident alien or for the benefit of a nonresident alien.87/

(2) Arizona requires recordation of documents evidencing the sale or other transfer of legal or equitable interests in real estate, excluding leases, within 60 days of the transfer.88/ An annual report is required of real estate holdings of aliens ineligible for citizenship.89/

(3) In Ohio, nonresident aliens who acquire an interest in real property, "in his own name or in the name of another," in excess of 3 acres or that has a market value greater than $100,000 or any interest in minerals with a market value in excess of $50,000 are required to file a report with the Secretary of State.90/ Corporations and other business entities with at least 10-percent ownership by a nonresident alien, or with at least 40-percent ownership by nonresident aliens in the aggregate, that acquire real property interests are subject to parallel requirements for reporting ownership of the property and information about the entity.91/

Most States do not impose a requirement that deeds, leases, and other instruments involving interests in real property must be recorded. In general, it is assumed that those acquiring interests in real property will record their instruments of conveyance for fear that a subsequent purchaser acting in good faith could gain a greater right to the real property.92/ However, unless recordation of instruments of conveyance

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83/ See 15 U.S.C. § 78p(a) (1976).
84/ Iowa Code § 558.44 (1979).
85/ Alaska Stat. § 34.10.040 (1978).
86/ Id. § 34.10.050 (1978).
87/ Id. § 22.15.110(4).
88/ Ariz. Rev. Stat. Ann. § 33-411.01 (1978).
89/ Id. § 33-1204.
90/ Ohio Rev. Code § 5301.254(B) (1979).
91/ Id. § 5301.254(C).
92/ See 4 American Law of Property § 17.5 (Casner ed. 1952).

is required or acquisitions must be reported on a mandatory basis, those acquiring interests in real estate who wish to remain hidden from public view can elect to assume the risk of a subsequent purchaser from, or creditor of, the grantor and not record.

Ban on Acquisition of Agricultural Land Except for Development

In a little noticed[93/] bill[94/] passed by the Iowa General Assembly in the closing days of the 1979 legislative session, the ownership rights of nonresident aliens in agricultural lands were further limited. The bill was signed by the Governor on June 10, 1979.

The 1979 bill changes the Iowa law as to nonresident alien investment in farmland in several material respects:

1. The bill repeals all of chapter 567 of the Iowa Code, which included: (a) the general limitation on ownership of real estate (not merely agricultural land) outside the corporate limits of cities in Iowa by nonresident aliens, corporations incorporated under the laws of a foreign country, and corporations organized in the United States if one-half or more of the stock was owned or controlled by nonresident aliens; (b) the provision authorizing nonresident aliens (and corporations) to acquire or hold title to up to 640 acres outside the corporate limits of any city in the State; (c) provisions on rights of nonresident aliens to inherit real property in the State; (d) rules for escheat of real estate held in violation of that chapter of the code; (e) requirements for detailed annual reports by nonresident aliens "owning or leasing agricultural land, or engaged in farming outside the corporate limits of any city" in the State; and (f) the detailed definitions of "nonresident alien" and "beneficial ownership." Parts of chapter 567 date from legislation enacted by the Iowa General Assembly in 1888.[95/]

The 1979 legislation did not repeal the requirements for reports to be rendered by county assessors,[96/] by those acting in a fiduciary capacity or as trustee for a nonresident alien,[97/] and by nonresident aliens identified as a beneficiary in a report filed with the Iowa Secretary of State.[98/] Likewise, the requirement was retained for a declaration of ownership by nonresident aliens of corporations owning or leasing agricultural land or which engage in farming activity, if the nonresident alien owns 5 percent or more of any class of corporate stock.[99/] And the 1979 law did not repeal the requirement of declaration of nonresident alien status of general or limited partners in a limited partnership owning or leasing agricultural land or engaged in farming.[100/] However,

93/ See Des Moines Sunday Register, May 13, 1979, Section A, p. 1.
94/ H.F. 148, 68th Iowa General Assembly (1979).
95/ See note 47 supra and accompanying text.
96/ Iowa Code § 172C.12 (1979).
97/ Id. § 172C.7(3).
98/ Id. § 172C.8(3).
99/ Id. § 172C.5(8).
100/ Id. § 172C.6(7).

as noted above, the general reporting requirement for nonresident alien ownership of agricultural land was repealed and replaced with a different type of report[101] and with registration of acquisition of agricultural land.[102] The definition of nonresident alien under the 1979 law is different from the prior law. Hence, confusion may develop over the definition of the term. In addition, information generated under one definition cannot be related to data obtained under the other definition. Both are unfortunate developments as viewed from the standpoint of continuity of the data base on nonresident alien ownership.

2. The 1979 legislation bars a nonresident alien, foreign business, or foreign government (or their agent, trustee, or other fiduciary) from purchasing or otherwise acquiring agricultural land in Iowa.[103] However, the ban does not apply to agricultural land, up to 320 acres in amount, acquired by inheritance or "for an immediate or pending use other than farming."[104]

Those holding more than 320 acres on the date of the Act (January 1, 1980)[105] may continue to hold the land but cannot acquire more.

Land acquired for a use other than farming must be converted to the other use within 5 years.[106]

Pending shift of the land to a use other than farming, the land cannot be used for farming except under lease to an individual; general or limited partnership; family farm, authorized or testamentary trust; or family farm or authorized corporation or other entity not included under the moratorium on acquiring agricultural land in the State.[107]

While holding agricultural land, a nonresident alien individual, foreign business, or foreign government (or their agent, trustee, or other fiduciary) cannot transfer title to or interests in agricultural land to another nonresident alien, foreign business, or foreign government (or their agent, trustee, or other fiduciary) except by inheritance.[108]

3. Although the 1979 legislation left the former definition in place for purposes of mandatory disclosure of beneficial interests by nonresident aliens, which is found elsewhere in the Iowa Code,[109] the 1979 law adopted a new definition of "nonresident alien" for purposes of the limitation on acquisition of interests in agricultural land.

The new definition specifies that a nonresident alien is "an individual who is not a citizen of the United States and who has not been classified

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101/ H.F. 148, § 9, 68th Iowa General Assembly (1979).
102/ Id. § 8.
103/ Id. § 4(1).
104/ Id. § 5.
105/ Id. § 4(3).
106/ Id. § 14.
107/ Id. § 3; Iowa Code § 172C.4 (1979).
108/ H.F. 148, § 4(4), 68th Iowa General Assembly.
109/ See Iowa Code § 558.43(1) (1979).

as a permanent resident alien by the U.S. Immigration and Naturalization Service.110/ A "permanent resident alien" apparently is one who is "lawfully admitted for permanent residence," which is defined as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant...."111/ Thus, the term excludes several categories of nonimmigrant aliens.112/ An example of a nonimmigrant alien would be an alien having a residence in a foreign country which the alien has no intention of abandoning and who enters the United States to "perform services of an exceptional nature" as a person of "distinguished merit."113/ Thus, the 1979 Iowa definition of nonresident alien is substantially broader in scope and classifies as a nonpermanent resident alien those aliens residing within the United States under less than "permanent" residency status. The constitutionality of the distinction drawn in the definition is not clear.114/ Aliens actually resident within the State but not within the category of "permanent resident alien" may have a complaint under the Iowa constitution.115/

The equal protection clause of the U.S. Constitution guarantees equality of treatment to those "within [the] jurisdiction."116/ In general, any classification rationally related to a conceivable purpose will be sustained.117/ Although the U.S. Supreme Court in 1923 upheld the alien land laws of Washington118/ and California119/ against a challenge on equal protection grounds, that position was reversed in a 1948 case involving the right of a minor child to receive land by gift from the child's father who was ineligible to hold title to land under State law.120/ In Takabashi v. Fish and Game Commission,121/ decided later in

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110/ H.F. 148, § 2(2).

111/ 8 U.S.C. § 1101(a)(2) (1976).

112/ Id. § 1101(a)(15) (1976).

113/ 8 U.S.C. § 1101(a)(15)(H)(i) (1976).

114/ See generally Lowe, The Arizona Alien Land Law; Its Meaning and Constitutional Validity, 1976 Ariz. State L. J. 253, 263; Morrison, supra note 6, at 639-646.

115/ Iowa Const. art. 1, § 22. See Stemple v. Herminghouser, 3 Greene 408 (Iowa 1852).

116/ U.S. Const. amend. XIV, § 1.

117/ See Developments in the Law -- Equal Protection, 82 Harv. L. Rev. 1065, 1078 (1969).

118/ Article II, § 33 of the Constitution of the State of Washington prohibited the ownership of land by aliens other than those who in good faith had declared their intention to become citizens of the United States. The provision was held not to violate the equal protection clause of the U.S. Constitution. Terrace v. Thompson, 263 U.S. 197 (1923).

119/ Under the California Alien Land Law, aliens eligible for citizenship can acquire real property the same as citizens. The statute was upheld against an equal protection challenge. Porterfield v. Webb, 269 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923). See Frick v. Webb, 263 U.S. 326 (1923) (acquisition of stock in corporation).

120/ Oyawa v. California, 332 U.S. 633 (1948).

121/ 334 U.S. 410 (1948). Thereafter, the California Supreme Court invalidated the California Alien Land Law. Sei Fujii v. State. 38 Cal. 2d 718, 242 P.2d 617 (1952).

1948, the U.S. Supreme Court struck down a California statute barring the issuance of fishing licenses to persons ineligible for citizenship.122/ The U.S. Supreme Court has not since been faced with the question of constitutionality of State laws restricting the rights of nonresident aliens, or those who are not permanent resident aliens, but the Court has included alien status as a "suspect classification" for equal protection purposes, as to resident aliens,123/ which strengthens the challenge to State laws restricting acquisition of land by aliens who are not permanent residents.124/ Thus, resident aliens who are not "permanent" resident aliens may be in a position to object to discriminatory treatment in Iowa with respect to land acquisition.

The 1979 legislation includes a new term, "foreign business," which is defined to include a corporation formed under the laws of a foreign country of any "business entity" in which a majority interest is owned directly or indirectly by nonresident aliens.

Under the definition formerly applicable, a nonresident alien was an individual not domiciled in nor a citizen of the United States; a corporation formed in a foreign country; a corporation organized in the United States if beneficial ownership was held, directly or indirectly, by nonresident aliens; or a trust, general partnership, or limited partnership if beneficial ownership was held, directly or indirectly, by nonresident aliens. In that context, the term "beneficial ownership" was defined to include a 10-percent or greater interest unless nonresident alien individuals in the aggregate, directly or indirectly, held a 25-percent or greater interest, in which case all interests held by nonresident aliens were included.125/

4. The 1979 bill imposes a reporting requirement on nonresident aliens, foreign businesses, and foreign governments (and their agents, trustees, or other fiduciaries) holding agricultural land "for an immediate or pending use other than farming."126/ In terms of information required, the report bears some resemblance to the report specified previously, although no information is required on the type of farming operation involved as was required under prior law.127/ Moreover, the report under the 1979 law is required only where agricultural land is held for nonfarm development; a report apparently is not required of those holding agricultural land as of the date of the 1979 legislation.

5. The 1979 law also imposes a registration requirement on each "nonresident alien, foreign business, or foreign governments, or an agent,

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122/ Compare Truax v. Raich, 239 U.S. 33 (1915) (successful challenge to a State law requiring employers of five or more employees to have not less than 80 percent qualified electors or native-born citizens).

123/ See, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (denial of welfare benefits to aliens who had not resided in the United States for a specified number of years violated equal protection clause).

124/ See generally Note, Equal Protection: A Closer Look at Closer Scrutiny, 76 Mich. L. Rev. 771 (1978).

125/ Iowa Code § 567.10 (1979).

126/ H.F. 148, § 9, 68th General Assembly (1979).

127/ See Iowa Code § 567.9 (1979).

trustee or fiduciary thereof, which owns an interest in agricultural land within this state on or after the effective date of [the] Act."128/ Such interests in agricultural land are to be registered with the Iowa Secretary of State within 60 days after the effective date of the Act (which would be 60 days after January 1, 1980) or within 60 days after acquiring the agricultural land or an interest in agricultural land, whichever is later. The registration is to show the name of the owner and the location and number of acres of agricultural land by township and county.129/ With the effective date for the 1979 legislation set for January 1, 1980, potential nonresident alien investors may be encouraged to make investments during 1979; such investments may be made within the framework of restrictions existing prior to passage of the 1979 limitations.

6. Agricultural land acquired in violation of the 1979 law and agricultural land not converted within 5 years to a nonfarm use escheats by court action to the State.130/ Escheated land is to be sold, with the proceeds going to pay the costs of sale. The remaining amount is to be returned to the person or firm giving up the property (up to the amount paid by the person or firm for the property), with any remaining amount passing to the county general fund.

7. Failure to register land or file a report, as required, is punishable by a fine not to exceed $2,000 for each offense.

8. The 1979 legislation did not repeal the 1978 statute, which became effective July 1, 1979, requiring the mandatory recordation by everyone, alien and citizen alike, of conveyances and leases of agricultural land, except for leases not to exceed 5 years' duration, made on or after July 1, 1979, and disclosure of beneficial ownership by nonresident aliens in entities acquiring interests in agricultural land by conveyance or by lease of greater than 5 years' duration.131/ Thus, nonresident aliens (as defined for that purpose)132/ are required to disclose beneficial interests acquired through the last half of 1979 and, beyond 1979, to disclose beneficial interests in agricultural land acquired, presumably, in conformity with the 1979 legislation.

It is important to note, however, that the requirement of disclosure of beneficial interests is coupled with a definition of "nonresident alien"133/ that represents a smaller group than the group of impermissible acquirers of agricultural land in Iowa after 1979.134/ The latter group includes anyone who is not a "permanent resident alien."135/

128/ H.F. 148, § 8, 68th General Assembly (1979).
129/ Id.
130/ Id. § 11.
131/ Iowa Code § 558.44 (1979).
132/ Id. § 558.43.
133/ Id. § 558.43.
134/ H.F. 148, § 2(2), 68th Iowa General Assembly (1979).
135/ Id.

CONCLUSIONS

With the 1979 legislation, Iowa joins the small but growing group of States that have enacted prohibitions or near prohibitions against ownership of land or agricultural land by nonresident aliens.[136] In addition to the nine States with total or near total prohibition of land or farmland ownership by nonresident aliens, more than a dozen States impose various types of restrictions on acquisition or ownership of land by nonresident aliens.[137] Several of those States impose acreage limitations on ownership of land by nonresident aliens.[138] Whether the recently enacted Federal law[139] requiring the disclosure of ownership interests in agricultural land by nonresident aliens, foreign corporaions, and corporations organized in the United States in which nonresident aliens own a 5-percent or greater interest will influence the apparent trend toward more restrictive State legislation remains unclear.

136/ See Conn. Gen. Rev. § 47-57 [(Supp. 1978) (aliens not resident in the United States may not hold land, except for French citizens, if reciprocity exists with France)]; Ill. Rev. Stat. ch. 6, §§ 1, 2 (Supp. 1978) (aliens must dispose of lands within 6 years unless U.S. citizenship obtained); Minn. Stat. Ann. § 500.21 (Supp. 1977-78) (must be citizen of United States or permanent resident alien); Mo. Rev. Stat. §§ 442.560 (1)(1978), 442.560(2)(1)(1978) (maximum of 5 acres of agricultural land and capable of supporting an agricultural enterprise); Miss. Code Ann. § 89-1-23(1974)(nonresident aliens may not acquire or hold land, except citizens of Syria or the Lebanese Republic); Neb. Rev. Stat. §§ 76-402, 76-414(1976) (ownership of land by aliens prohibited beyond 3 miles from city or village); Okla. Const. art. 22, § 1 (aliens who are not U.S. citizens or bona fide Oklahoma residents prohibited from acquiring or owning land). See Wyo. Stat. § 34-15-101(1977) (nonresident aliens not eligible for U.S. citizenship prohibited from owning land except where reciprocity exists with the alien's country).

137/ See generally Brodkey, Foreign Investment in U.S. Real Estate: The Role of State Restrictions in Structuring the Transaction, Lawyer's Supplement to the Guarantor, Chicago Title Insurance Co. (Sept.-Oct. 1978).

138/ See, e.g., Senate Bill 90, Legislature of the State of South Dakota, amending S.D. Comp. Laws Ann. § 43-2-9 (limit of 160 acres, effective June 1, 1979).

139/ Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C.A. §§ 3501-3508 (Supp. 1979).

CHAPTER 4

FOREIGN COUNTRY REGULATIONS AND ACTIVITIES

Bruce Zagaris */

PART I

INTRODUCTION

This is the first portion of a two-part report. It discusses the restrictions and protections surrounding investments by U.S. persons in foreign real estate. The report embraces both nonincome-producing real estate, such as residential and vacation dwellings, and income-producing real estate, such as commercial real estate and the extraction of natural resources. This part of the report is made up of two major sections: the classification of potential restrictions and protections of selected countries pertaining to the investment transactions in question; and a description of public international law elements which may modify domestic law provisions.

CLASSIFICATION OF POTENTIAL RESTRICTIONS AND PROTECTIONS

Two principal types of law may affect a U.S. person investing in foreign real estate--municipal or domestic laws of the foreign country in which the real estate is situated and public international law. Their interaction depends on an analysis of the sources of public international law (e.g., treaties) and the constitutional and statutory laws applicable to the transaction.

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Domestic Laws and Regulations

For discussion purposes, the domestic laws containing potential restrictions and protections which a U.S. person investing in foreign real estate may encounter are divided into 13 categories. These 13 categories are summarized in the appendix.

Special Provisions for Alien Investors in Real Estate

Laws regulating foreign investments often are found in special legislation which also regulates those aspects of national economic policy. Hence, the foreign investment laws of Argentina, Mexico, Uruguay, and the Andean Common Regime provide that, besides the sectors or activities to which they refer, other sectors or activities may be governed by special laws. Therefore, the laws governing foreign investment in real estate may be found in the laws on foreign investment generally and/or they may be found in the laws pertaining to real estate or to aliens. In other cases, they may be situated in statutes concerning agricultural land or mining or atomic energy, etc. The indication in the appendix of the existence of special provisions for alien investors in real estate signifies that laws exist to regulate investment by aliens in real estate differently from those laws which apply to nationals.

The differences in the laws of each country reflect differences of economic policies or criteria which governments apply in the sectors of their national economies that are impacted by national and foreign capital. The interaction of legislation concerning national economic policies and that concerning foreign capital varies considerably--they may be harmonized or one type of legislation may take precedence over another, at least for certain activities.

One trend which can be detected in national legislation is that greater participation is taking place by the state and national capital in the key sectors of the individual economies of the various countries.

An important issue in foreign investment legislation is how to define "investment." Ordinarily the definition includes foreign capital, physical assets, loans and credits, reinvested profits, and intangible assets.

Most foreign investment legislation includes tangible assets as within the definition of foreign capital or investment. Tangible assets are finance capital and physical assets such as machinery and equipment. Laws applicable solely to foreign investors may emphasize that the capital must be of a foreign origin and constitute a real addition to a country's assets. The laws of some countries specify that tangible assets must not only be imported, but that they must be completely or largely financed from abroad.

While some countries such as Chile, Tanzania, and Kenya consider foreign loans and credits to be capital for purposes of foreign investment, others, such as Morocco and Iran, do not mention loan capital at all in

their legislation, and presumably exclude such capital from the benefits of their respective laws.

Many foreign investment laws include in their definition of foreign capital certain intangible assets such as licences, trademarks, patent and other rights, and know-how. The inclusion of intangible assets is significant in structuring many commercial (e.g., hotels and office buildings), industrial, and mining investments.

The institutional and administrative infrastructure under which foreign investment in real estate is regulated may determine substantive issues. The purpose and functions of administrative control vary widely.

To implement regulation and control of foreign investment laws, governments usually establish a competent authority to receive, evaluate, and authorize the entry of foreign capital. The same authority also may supervise the continuation, expansion, transfer, or liquidation of such investment.

Investment authorities (or committees, boards, councils) often are established under the investment legislation.

Some countries have more than one investment authority with various types of functions allocated among them. For example, in Brazil the responsibility is divided between the Central Bank of Brazil, through the Capital Supervisory and Registration Service, and the National Monetary Council. In general, efficiency and convenience for the investor are realized if all administrative functions are concentrated in one authority.

In some countries, a single body at an interministerial cabinet level or under single ministerial supervision often makes up the competent authority concerned with regulating and supervising foreign investments. Argentina, Bolivia, Uruguay, and Venezuela employ such an administrative mechanism. Another approach which has been adopted is to establish a central organism, composed of high-level officials of various agencies. For instance, in Mexico, legislation centralizes the regulation and supervision of foreign investments in the National Commission on Foreign Investment.

The functions of investment authorities vary. Administratively, investment authorities may be either advisory bodies or executive bodies. They may either merely receive investment applications and forward them to appropriate ministries or make recommendations for their approval or rejection. In addition to the foregoing, they may themselves make decisions approving or rejecting investment proposals or calling for their resubmission.

In addition to the foregoing administrative functions, investment authorities may serve as consultants to prospective investors. In this connection, investment authorities may inform prospective investors of investment opportunities, assist them with or perform market research or other surveys for them, and generally act as an investment advisory

service. In many countries, the administrative and consultative functions are separated and vested in two separate bodies.

The procedural requirements for a foreign investor ordinarily are contained in investment legislation. Usually, a prospective investor must submit an application of his proposed investment with all supporting documents. During the pendency of the investment application, the prospective investor may be asked to give additional information. If the investment is approved, the investor receives a certificate of approval or some similar document entitling the investor to all or some of the benefits under the legislation.

In some countries, receipt of approval may be the only possible way for foreign capital to enter the country. In other countries, it may be allowed free entry, with the obtaining of approval necessary only in order to receive benefits that a nonapproved foreign investment will not enjoy. Some foreign investment legislation does not apply to real estate transactions or at least to certain types of real estate investment (e.g., residences) or does not apply to what is deemed an investment of an insignificant amount.

Total Prohibition of Alien Interests in Real Estate

The total prohibition of alien interests in real estate is not common among the countries investigated.

The Constitution of Liberia drastically limits alien interests in real estate. It provides in pertinent part: "...no persons shall be entitled to hold real estate in this Republic, unless he be a citizen of the same. Nevertheless, this subsection shall not be construed to apply to Colonization, Missionary, Educational, or other benevolent institution, so long as the property or estate is applied to its legitimate purpose."[1/]

Alien interests tend to be substantially or totally restricted in many socialist countries in Eastern Europe. In the Union of Soviet Socialist Republics, all the land belongs to the state and direct investment by foreigners is prohibited. Policies concerning alien interests in real estate elsewhere in socialist Eastern European countries vary. In Czechoslovakia, foreigners may not own land or housing units, but can lease such property from the state. In the German Democratic Republic (East Germany), foreigners must obtain residential or commercial space through the state authorities. However, if a foreigner obtains a permanent residence permit, he may obtain the same ownership rights as nationals. In addition, foreigners may inherit property, but unless it

1/ Liberian Laws, 22: 1-2.1, in International Center for Settlement of Investment Disputes, Investment Laws of the World (1978) [hereinafter cited as ICSID].

is used personally, it will be nationalized or sold at the state-controlled price.2/ In general, foreigners investing in Yugoslavia are limited to 49 percent. However, in some cases, the percentage may be higher if industry or technology is needed for development.3/

Most foreign countries which prohibit direct foreign investment in real estate permit long-term leases or a similar form of holding an interest in real estate. In such cases, the use made of such interest in real estate may be expressly limited to purposes permitted in foreign investment laws. Hence, leasing of real estate from a state authority for purposes of establishing an export or priority enterprise may be allowed.

Restrictions on Alien Investment in Certain Geographic Areas

Some legislation permits foreign investment generally, but restricts such investment in certain geographic areas. Typically, geographic areas restricted are in border areas or other areas important to the military or other security objectives of a foreign state. Areas which are ecologically fragile, such as estuaries, coastal property, lakes, rivers, and special forest land may be restricted to foreign investors. In a political system in which subnational levels of government have authority to regulate land, such as in Australia, Canada, Switzerland, and the United States, the subnational governments may impose restrictions applicable to investments within their territorial jurisdiction.

In Mexico, foreigners, with the prior written consent of the Ministry of the Interior, and provided they obtain the necessary legal authorizations in connection therewith, may acquire realty rights in rem; i.e., shares or participations in companies dedicated, in any manner, to the acquisition and trading of realty. However, such foreigners may not acquire under any circumstances fee simple to land and waters within a zone of 100 kilometers along the frontiers, and of 50 kilometers along the coast.4/

In Australia, the authority to regulate land tenure by each State and Territory has resulted in separate, but similar laws and procedures, and is complicated, particularly with respect to agricultural investments. Each of the six States has a Lands Department under the direction of a Minister, who is responsible for the administration of acts concerning the alienation, occupation, and management of Crown lands. In fact, a foreigner wanting to buy land for purposes other than agriculture does

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2/ Nat'l Assn. of Realtors, International Real Estate Markets: Comparative Study of Selected Nations 27-29 (Oct. 1978).

3/ Id.; see also Morse, Legal Structures Affecting International Real Estate Transactions, 26 Am.U.L.Rev. 34, 50-52 (1976).

4/ Guerrero, Acquisition of Real Property, Investment in Corporations and Probate Law in Mexico: I, 10 Real Property, Probate and Trust J. 427, 428 (1975); 7 Martindale-Hubbell Law Directory 3707 (1978).

not incur too much difficulty--with the exception of Crown lands, which are primarily in the State of Queensland.[5]

In Greece, aliens generally may acquire land and own real estate, with the exception of land and real property located in frontier areas.[6]

In Indonesia, foreign investors must apply for and receive the approval of the government, which determines the geographic area in which investment can be made in accordance with natural and regional development plans.[7].

In the Federal Republic of Germany, some States (Lander) require special permits for foreign corporations to acquire real property.[8]

In Spain, real property can be purchased by foreigners living abroad, with the following exceptions: purchases on islands shall not exceed 25 percent of the island's area; and nonurban property located in certain areas (e.g., the Balearic Islands, Galicia, and the Canary Islands) must have prior approval of the Minister of the Army. Applications must be accompanied by a plan showing the layout and the location of the property.[9]

In Canada, the provinces have the authority to regulate real estate. Under the British North America Act, the provinces have exclusive authority to regulate real property[10] and to manage and sell public lands of the province.[11] Legislative approaches in Canadian provinces concerning foreign investment in real estate vary from guaranteeing that foreign investors shall have treatment equal to that of Canadian citizens to prohibitions on alien acquisition of land.

Provincial laws concerning real estate vary according to whether they govern Crown lands or private property. Three provinces prohibit the alienation of Crown lands to nonresidents and aliens.[12] Two other provinces restrict the ability of aliens to acquire resort property.[13] Nevertheless, aliens may lease almost all public lands.

5/ U.S. Dept. of Commerce, Overseas Business Reports, 76-15, at 25.

6/ U.S. Dept. of Commerce, Overseas Business Reports, 76-17, at 12.

7/ Indonesian Laws, Law Governing Investment of Foreign Capital, chapter 4, in ICSID, supra note 1.

8/ 7 Martindale-Hubbell Law Directory 3538 (1978).

9/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14, at 19-20.

10/ British North America Act of 1867, 30-31 Vict., C. 3, sec. 92(13) (Can.).

11/ *Id*. sec. 92.

12/ Land grants to foreigners are prohibited under British Columbia's Land Act of 1970, B.C. Stat. c. 17, sec. 7(3) (1970); Newfoundland's Crown Land Amendment Act, Nfld. Stat. No. 46 (1971); and Alberta's Public Lands Act, Alta. Rev. Stat. c. 297 (1970).

13/ Only Canadian citizens may lease a summer home in Ontario according to Ont. Reg. 246/71, sec. 12, and Quebec charges aliens higher rents for resorts under Quebec Lands and Forest Reg. No. 9A (1972).

Nonresident aliens are prohibited from acquiring private land above a specified amount of acreage in the provinces of Prince Edward Island and Saskatchewan.14/

In the provinces of Alberta, Nova Scotia, and Ontario, alien real estate investors are required to register. Alberta's Land Titles Amendment Act requires that a statement of citizenship must be made by all non-Canadian individuals or corporations with 51 percent foreign ownership which purchase or agree to purchase land in fee simple absolute.15/ In the province of Nova Scotia, the Land Holdings Disclosure Act16/ requires that all nonpermanent residents of Nova Scotia who acquire landholdings or anyone who acquires land on their behalf register and disclose their citizenship.17/ "Landholding" is defined to embrace not only fee simple transfers, but also any interest in land other than a security interest.18/ Registration is required both for future purchases and for currently held real estate.19/ All corporations are required to register their landholdings unless they meet specific exceptions. In Ontario, foreign investors in real estate must register and pay a tax of 20 percent. This rate contrasts with the tax imposed on a resident of 3/10 of 1 percent of the consideration up to and including 6/10 of 1 percent on the remainder. The Ontario legislation applies to the conveyance of "an interest of any kind in land," with the exception of security interests for debts and transfers of land where there is a change in the legal but not the beneficial ownership.20/ A nonresident is defined as any individual who is not "ordinarily resident in Canada"21/ or a resident who is not a Canadian citizen. Included in the law are partnerships, associations, or trusts in which the benefits of ownership accrue to nonresident persons.22/ Corporations also must comply with the Ontario laws if nonresidents own 50 percent or if the corporation is "controlled directly or indirectly by one or more nonresident (natural or artificial) persons."23/

In Austria, the acquisition, possession, and disposition of real property by foreigners is regulated by the Provinces (laender), most of which have enacted legislation requiring special approval by local authorities prior to all transactions.24/

14/ Nonresidents are permitted to own only ten acres of land, and some frontage of five chains in Prince Edward Island under the Act to Amend the Real Property Act, P.E.I. Stat. c. 40 (1972).
15/ Id.
16/ N.S. Stat. ch. 13 (1969).
17/ Id. sec. 1(e).
18/ Id. sec. 1(c).
19/ Id. sec. 4.
20/ Land Transfer Tax Act, Ont. Stat. c. 8 (1974); Land Transfer Tax Amendment Act No. 2, Ont. Stat. c. 93 (1974).
21/ Id. sec. 1(1)(g).
22/ Id. sec. 1(1)(g)(ii).
23/ Id. sec. 1(1)(f)(v).
24/ U.S. Dept. of Commerce, Overseas Business Reports, 76-08, at 22.

A broad restriction is imposed by Brazil on investment by nonresident aliens in rural property. Pursuant to the enactment of legislation in 1971, acquisition of rural property by foreigners is subject to detailed regulations, many of which have provisions based on geographic elements. For instance, foreigners acquiring rural property involving less than three modules are excluded from the restrictions of the legislation.[25] In addition, the law gives the executive power to lower the norms for acquisition of an area comprising between 3 and 50 modules of undetermined exploitation. Another restriction based on a geographic standard is that the total area of rural properties belonging to foreign natural or juridical persons may not exceed 1/4 of the land area of the municipalities in which they are situated, as verified by the certificate of the Real Property Register.[26] Foreign natural persons are prohibited from acquiring more than 50 modules of undetermined exploitation, in a continuous or interrupted area.[27] Several other provisions of the 1971 law contain restrictions based on geographic elements.

Restrictions on Holding Certain Interests in Real Estate

Legislation governing foreign investment in real estate may prohibit the holding of certain types of interest, such as fee simple interests or the equivalent thereto and long-term leases. An exact delimitation of the rights and limitations a foreigner may have in such interests would require a knowledge of real property law of the foreign country and a careful reading of the provisions of the applicable statutes or regulations.

The limitations imposed on holding certain interests in real estate may effect the duration a foreigner may hold real estate. In other cases, the limitations may prevent the foreigner from owning real estate, but not from enjoying most of the uses of ownership. Some statutes may restrict certain uses enumerated in the relevant legislation while other statutes may allow only the uses enumerated in the statutes. In some statutes, limitations may be set forth in provisions concerning the holding by foreigners of interests in real estate and may also be contained in the portions of the statutes relating to activities restricted to foreigners. Both of these restrictions may be situated in one statute on foreign investment legislation.

In some countries, according to fundamental law enshrined in the constitution, mines, quarries, and other subsoil rights are the property of the state. In Spain, pursuant to both its Constitution and statutes,

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25/ Law 5,709 of Oct. 7, 1971 (Brazil) in Regulating the Acquisition of Rural Property by Foreigners Residing in the Country or Foreign Judicial Persons Authorized to Operate in Brazil, in A Comparative Study of Latin American Legislation on the Regulation and Control of Private Foreign Investment 134-39 (Organization of American States 1975) [hereinafter cited as O.A.S.].

26/ Law 5,709, Art. 12.

27/ Id. Art. 3.

the state has ownership of mines, quarries, and other subsoil rights. The state may exploit them directly or contract for their exploitation with Spanish individuals or companies constituted and domiciled in Spain.28/ In Mexico, rights to all the minerals are expressly reserved by the Constitution and belong to the Nation, along with the rights to natural surface waters, territorial ocean waters, rivers, streams, lakes, etc.29/ In addition, the Constitution also reserves for the Nation the legal title to the "space situated above the national territory, to the extent and limits fixed by international law."30/

If a country reserves its territory, especially in its constitution, U.S. persons will be able to obtain only rights less than fee simple. The extent to which the prospective U.S. investor will be limited depends upon the purposes for which he wants to invest in real estate and the potential rights available to him after the reservation is made by the state.

In Saudi Arabia, the question whether a foreign corporation can own real estate is answered in a combination of two pieces of legislation--the foreign investment law and the law regarding the ownership by non-Saudis. They allow a limited right of ownership which an entity enjoying the status desired by the foreign capital investment law can enjoy in real property. However, a foreign corporation may not obtain absolute ownership of realty or property, as may a Saudi national. In addition, as is discussed in the next section, foreign capital that may be invested in Saudi Arabia is limited in its use to projects for economic development (other than oil and mining industries, which were taken out of this law because they have special rules governing them), and investment in activities of a purely commercial nature are not allowed in Saudi Arabia.31/

Mexico has enacted legislation which, on the one hand, tries to prevent foreigners from having full ownership rights, and, on the other hand, grants to foreigners wide latitude to use and derive a profit from holding limited rights in real estate.

For decades, foreigners circumvented laws prohibiting foreign ownership of real estate in Mexico by acquiring title through Mexican corporations or by the use of Mexican nominees. On April 30, 1971,32/ a presidential decree allowed foreigners to acquire under certain conditions beneficial trust rights to land in those areas. The Mexican legislature enacted a law, effective on May 8, 1973, confirming the decree.33/ In addition,

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28/ Mining Law of 1868 (Spain), as amended in July, 1944, and administrative regulations of August, 1946 law.

29/ Mexican Civil Code for the Federal District and Territories, Art. 798.

30/ Id. Art. 792.

31/ I. Nazer, Doing Business in Saudi Arabia, Current Legal Aspects of Doing Business in the Middle East--Saudi Arabia, Egypt, and Iran 117 (A.B.A. 1977) [hereinafter cited as Nazer].

32/ The full text is in Diario Official, April 30, 1971.

33/ Law to Promote Mexican Investment and to Regulate Foreign Investment, Diario Official, March 9, 1973.

the decree and statute provided that foreigners had the right to purchase realty in the interior of Mexico if registration requirements are fulfilled. Hence, current Mexican law, although preventing a foreigner from buying a house or condominium within approximately 30 miles of the coast of Mexico, allows a foreigner to make a land purchase and have title held in trust for him as a "personal right" by an authorized Mexican bank, for up to 30 years. The trustee must at all times hold the title to the realty. At the end of 30 years, the foreigner must sell his beneficial interest to a person legally entitled to acquire it, such as a Mexican corporation or national. A foreigner having a beneficial interest in a trust may have the trustee lease his interest to other foreigners for up to three 10-year terms, and he may keep all rentals as well as sale proceeds if he disposes of his interest. Money received for rent or sale of the realty can be freely converted into dollars. No restriction is imposed on repatriation of all money to the United States. A foreigner wanting to acquire a tract of over 2,000 square miles must fulfill additional requirements.

Mexican law also permits a foreigner to hold limited interests in development property. For example, a foreigner wanting to acquire a share in a multiple-residential dwelling or an office building, both of which are usually developed under a single master trust, will obtain from the trust bank, prior to closing, a "participation certificate." Before the closing, the trust bank will have obtained for him from the Ministry of Foreign Relations the necessary permit to allow him to acquire his beneficial interest. The master trust "participation certificate," which a foreigner will receive, will state that it does not convey any fee simple rights in the real property held in trust, as will the individual trust instrument if he makes a direct transfer from a private seller to an authorized trustee bank.[34]

A foreigner may acquire and hold a fee simple title to land in the interior. However, the approval of the Federal Government must be obtained, and legal restrictions limit the quantity and the use that he or she may make of it.[35]

In the legislation of some countries, the duration of tenure may determine whether governmental approval is required. In Finland, in 1939, legislation was enacted concerning the right of foreigners to acquire real estate and shares in Finnish companies. The law requires that a company in which more than 20 percent of the shares are owned by foreigners must apply to authorities for permission to purchase real estate or to rent real estate for a period of more than 2 years.

In Indonesia, foreigners can obtain land from the government in connection with direct investments. Broad powers are given to foreign

34/ Chayet & Sutton, Mexican Real Estate Transactions by Foreigners, Denver J. of Int'l L. & Policy (Spring, 1974).

35/ Sutton, Acquisition of Real Property, Investment in Corporations and Probate Law in Mexico: II, 10 Real Property, Probate & Trust J. 428, 429 (1975).

enterprises obtaining such land.[36] Under the law, land may be provided, with the right of construction, the right of exploitation, and the right of use in accordance with the regulations.[37] However, the right of building can be granted for a maximum of 30 years, which, with a view to the condition of the enterprise and the building, can be extended another 20 years. The right of exploitation can be given for a period of up to 25 years. Enterprises which, due to the kinds of plants under operation, require a longer time, can obtain the right of exploitation for a longer period by extending the term of the said right up to 25 years. The right of use is granted for a period of time according to the need, with a view to the limitations set forth for the right of building and the right of exploitation.[38]

In Iran, foreign real estate ownership is permitted for residential use only. Real estate purchased for residential purposes by foreigners must be sold within 6 months after the person(s) leaves Iran.[39]

In Jordan, a foreign enterprise wanting to undertake a direct investment is required to apply to the Council of Ministers, which, if the application fulfills certain conditions, may declare the proposed investment as having the status of an "approved economic project." After it is declared an "approved economic project," the Council of Ministers may, on the recommendation of the Committee, grant, free of charge, an approved economic project created outside the territory of the capital, tracts of land necessary for its purposes, provided that much land shall be delimited to meet its indispensable requirements. The law provides further that if such a project is not created outside the territory of the capital, or, if created, is subsequently transferred or liquidated, the ownership of such tracts of land shall revert to the state, and shall not be transferred otherwise.[40]

In Spain, the law distinguishes between purchases of real estate by foreigners in connection with an industrial or commercial operation, if the original purchase was made with imported capital. Industrial or commercial operations are not considered to include commercial activity in real estate as such. Stricter restrictions are imposed on real estate which is bought for other purposes, such as industrial or speculative purposes.[41]

In Switzerland, the acquisition of real estate by nonresident aliens or by legal entities in which nonresident aliens have a majority interest requires a license. A license can be obtained only if a justified interest has been proven. Justification can be shown if real estate is

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36/ ICSID, *supra* note 1, Law Concerning Investment of Foreign Capital (Indonesia), sec. 1:2A-2.1.

37/ *Id.* sec. 1:22A-5.2.

38/ *Id.*

39/ Nat'l Assn. of Realtors, *supra* note 2, at 55.

40/ Jordan, Encouragement of Investment Law, sec. 2:2A-5.6, in ICSID, *supra* note 1.

41/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14 at 19-20.

to be used for a trading, manufacturing, or other commercial establishment. Acquisition of real estate for personal use may under some circumstances, such as in the case of dwellings for vacations, be considered justified. However, licenses are given to acquire real estate for investment purposes only for new low-rent housing.42/

Restrictions on Alien Investment in Certain Sectors or Types of Businesses

Almost all foreign countries expressly exclude foreign investment in certain sectors or types of businesses. In some countries, these provisions are contained in foreign investment legislation itself while in other countries foreign investment legislation addresses foreign investment generally, and only refers to other legislation which may be applicable, such as legislation governing investment in particular sectors.

The restrictions on foreign investment in certain sectors or types of businesses vary. In some cases, restrictions may prohibit any use of real estate other than that for which approval has been granted. In some cases, foreigners may only be able to hold a minority interest in a restricted sector. A restriction on investment in a sector or type of business may correspond with what is also a geographic restriction. Hence, restrictions on agricultural investments may in part reflect an objective to prevent foreigners from investing in rural areas. In the event that a sector is considered sensitive, foreign investment legislation may require only that approval be obtained.

In some countries' foreign investment legislation, investment in certain sectors is precluded or at least not encouraged unless it is accompanied by new technology or by investment of a minimal amount of capital, which is designated in the legislation.

In Argentina, foreign investment legislation expressly forbids investments in eight types of business activities. Among the latter are some related directly to real estate--agricultural, stockbreeding, and forest activities, except those providing new technology in the opinion of the investment regulatory authority. In addition, the legislation also prohibits foreign investments in national security and defense activities, public services, insurance, commercial banking, enterprises engaged in the media, local marketing services of any products whatsoever (excluding those of their own manufacture), and activities which, according to law, are reserved to government entities or Argentine capital companies.43/

In Austria, foreign investment regulations restrict the right of foreigners to engage in certain trades, businesses, and professions, such as banking, insurance, the tourist trade, and state monopolies. Sometimes these restrictions can be overcome by forming an Austrian

42/ 7 Martindale-Hubbell Law Directory 4013 (1978).
43/ O.A.S., supra note 25, at 135.

subsidiary and employing an Austrian person with the required competence in the particular field.[44]

In Australia, special restrictions apply to investment in real estate other than factories or dwellings.[45] Australian national governments have vacillated in their regulations of foreign investment in minerals. Recently, the former hardline approach was moderated so that new development projects, other than those concerning uranium, may be up to 50 percent under foreign ownership or control in terms of voting strength. Local equity participation of 75 percent is now required for the development and sale of uranium.[46] The six states in Australia also have broad authority over investments in land (discussed in the section on restrictions on alien investment).

In Brazil, restrictions are imposed on the acquisition by foreigners of rural land, and, in addition to the restrictions with a geographic basis discussed in the section noted above, provides that they may only acquire rural property to be used for agricultural, livestock, industrial, or land settlement projects, which are pursuant to the objectives stated in their charter. Such a limitation embraces both restrictions on certain interests as well as on the types of business which may be conducted.[47]

In the Dominican Republic, prior authorization from the executive power is required for aliens to acquire real property for the purpose of constructing family housing, conducting commercial or industrial utilities, developing urban areas, or constructing buildings to promote the tourist industry.[48]

In France, certain sectors of the economy are state-owned, such as communications and electricity. Other economic sectors are withdrawn altogether from foreign investment or require special authorization, such as marine, air and land transportation, petroleum extraction, banking, and insurance.[49]

In Guinea, six categories of investments are classified as top-priority investments. Included are mining industries and industries for the enriching or transformation of mineral resources. Mineral industries and oil and hydroelectric companies will, according to each type of case, be subject to a particular agreement worked out with the Government.[50]

In Indonesia, types of business activities are closed to foreign capital investment, including, _inter alia_, the following: harbors; the production, transmission, and distribution of electric power to the public; telecommunications; shipping; aviation; drinking water; the development

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44/ U.S. Dept. of Commerce, Overseas Business Reports, 76-08 at 22.
45/ U.S. Dept. of Commerce, Overseas Business Reports, 76-15.
46/ _Id._ at 23-24.
47/ O.A.S., _supra_ note 25, at 135.
48/ 7 _Martindale-Hubbell Law Directory_ 3673-74.
49/ _Id._ at 3486.
50/ Guinean Laws, sec. 24:2A-43, in ICSID, _supra_ note 1.

of atomic energy; and those important for national security. In addition, the Government may further determine other specified spheres of activity to be closed to further capital investment.[51]

In Japan, aliens are required to obtain governmental approval for investments. The determination of approval or validation depends on whether the industries that are the subject of investment are classified as partially liberalized--which embraces agriculture, forestry, marine products, mining, petroleum, leather, and leather manufacturing--or fully liberalized--which embraces all other industries. Further requirements concerning foreign investment in Japan depend on whether companies are new or existing.[52]

New companies intending to invest in industries of agriculture, forestry and marine products, oil refining and sales, and leather and leather product manufacturing, which are partially liberalized industries, may obtain automatic validation to acquire shares only if less than 10 percent of the outstanding shares, and total foreign shareholding will be less than 25 percent and not more than 15 percent in the fishing industry. In the remaining partially liberalized industries, mining and petroleum industries other than oil refining and sales, automatic validation will be given if total shareholding does not exceed 50 percent of outstanding shares. In all other industries, validation will be given automatically without limit on foreign shareholding.[53]

Different regulations apply to existing companies. If an existing company belongs in a partially liberalized industry, or if it belongs to a fully liberalized industry and does not consent to foreign share acquisition, automatic validation will be given only if shareholding of the acquiring foreign investor will be less than 25 percent in most companies and will not exceed 15 percent in certain restricted companies such as mining, fishing, banks, public utilities, etc. If an existing company belongs to a fully liberalized industry and consents to foreign share acquisition, automatic validation will be given without limitation on foreign shareholding.[54]

Automatic validation also requires fulfilling certain qualifications unrelated to the percentage of foreign shareholding. If the qualifications are not met or if foreign shareholding exceeds the limits eligible for automatic validation, share acquisition will be subject to close government scrutiny.[55]

In addition to the foregoing requirements for foreign investment in Japan, investment by nonresidents in real estate is subject to special screening. Corporations controlled or owned by aliens are regarded

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51/ Indonesian Laws, sec. 1:2A-2.4.
52/ 7 Martindale-Hubbell Law Directory 3673-74.
53/ Id.
54/ Id.
55/ Id.

as "foreign investors" for purposes of application of foreign investment.[56/]

In Jordan, acquisition by foreign investors of land from the state requires that a project be an "approved economic project." This, in turn, requires that a project fulfill the following conditions:

1. It must be an economic project within the sectors of industry, tourism, housing, or land reclamation;

2. In the case of an industrial project, the value of its machinery, tools, and equipment shall be not less than JD $5,000;

3. In the case of a tourism project, its cost will be no less than JD $15,000, excluding the cost of the land.[57/]

Hence, to the sectoral requirements in Jordan are added requirements that a minimal amount of capital be invested.

In New Zealand, foreign investment is not encouraged in fishing or farming unless new technology is introduced.[58/]

In Spain, foreigners may not invest in certain industries such as national defense and the media. Foreign investment is permitted in some industries, such as mining, but is governed by special legislation. Foreigners must receive prior approval before participating in certain business activities, such as minerals, hydrocarbons, nuclear energy, aluminum, and copper.[59/]

Limitation of Alien Interests to a Certain Percentage

In many countries' foreign investment legislation, the potential restrictions and protections of foreign investors depend on the latters' percentage of equity holdings. For example, Decision 24 of the Andean Common Regime classifies three types of enterprises according to the percentage of foreign equity. Member countries within the Andean Common Regime can then reserve sectors according to the classifications. The legislation of some countries, such as Australia, may make no more than 50-percent foreign ownership a nonbinding guideline. The legislation of some countries, such as Finland, Japan, and Spain, only requires permission once a certain percentage of foreign equity is exceeded. In other countries' legislation, such as Saudi Arabia and Iran, the granting of certain benefits are linked to having a minimum amount of or at least substantial local participation. The legislation of some countries, such as Spain, requires a certain percentage of foreign equity before an

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56/ *Id.* at 3666.
57/ Jordan Laws, sec. 2:2A-2.3, in ICSID, *supra* note 1.
58/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 19.
59/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14, at 19.

enterprise may utilize internal credit. Hence, limiting alien interests to a certain percentage of equity is not unusual in foreign investment legislation. The significance of complying with the above-mentioned limitations varies, and often depends on the interaction of this requirement with the requirements described in other categories of this report.

In the Andean Common Regime (ANCOM), sectoral restrictions on foreign investment vary according to whether an enterprise is classified as a national, mixed, or foreign enterprise. A national enterprise is defined as a locally formed enterprise "more than 80 percent of whose capital belongs to national investors."[60] A mixed enterprise is defined as a locally formed enterprise owned 51 to 80 percent by national investors.[61] A foreign enterprise is defined as a locally formed or established enterprise which is owned less than 51 percent by national investors, or in which, if a larger percentage of ownership exists, it is not reflected (in the opinion of the proper national authority) in the management of the enterprise.[62] The ANCOM Commission and each member country may limit specified sectors to state or private enterprises and may allocate private sectors to national enterprises, mixed enterprises, or foreign enterprises. For instance, Article 38 of Decision 24 allows each member country to reserve sectors of economic activity for national, public, or private enterprises, and to determine whether to admit mixed enterprises, but allows the ANCOM Commission on the Board's recommendation to determine the sectors which shall be reserved and to determine whether mixed enterprises shall be admitted.[63]

In Australia, recent amendments in its foreign investment legislation have provided that majority ownership and control by Australian nationals of major investments are objectives. Regulations governing mineral resources provide that, although each investment proposal is to be considered on its own merits, new foreign investments should not exceed 50 percent ownership or control in voting strength. However, foreign equity holding in uranium should not be greater than 25 percent.[64]

In the Dominican Republic, foreigners desiring to acquire real property must obtain prior authorization from the executive.[65] However, corporations comprised of at least 30 percent ownership by citizens of the Dominican Republic are exempted from the requirement.[66]

60/ Decision 24, Art. 1 (see Common Rules Governing the Treatment of Foreign Capital, Trademarks, Patents, Licenses, and Royalties, adopted Dec. 31, 1970, effective June 30, 1971), reprinted in Intn'l Leg. Mat. 138 (1977).

61/ Id.

62/ Id.

63/ Id.

64/ U.S. Dept. of Commerce, Overseas Business Reports, 76-15.

65/ Decree 2543 of March 22, 1945 (Dominican Republic), in 7 Martindale-Hubbell Law Directory 3416.

66/ Id.

In Finland, companies in which more than 20 percent of the shares are owned by foreigners must apply to authorities for permission to purchase real estate or to rent real estate for a period of more than 2 years.67/

In Iran, foreign investment legislation encourages business ventures undertaken by foreigners, provided they include substantial Iranian private sector participation. No specific equity interest is required. Exceptions can be made if the Iranian Government considers the venture in the national interest and if no local partner is available.68/

In Japan, foreign investors must have their investments validated. The decision as to whether validation will be given depends on the sector intended for investment, the percentage of foreign equity interests, and whether the foreign company is new or existing. The maximum amounts of allowable foreign investment vary from 15 percent to 50 percent. These requirements are discussed above in the previous section.69/

In New Zealand, the borrowing or raising of funds by a firm which is not incorporated in New Zealand or by a company which is incorporated in New Zealand, but of which 25 percent or more of the voting capital is foreign-controlled, must be approved by the central bank.70/ Another foreign investment law based on the percentage of equity held is that any proposal by an overseas person or entity to take control of 25 percent or more of the capital stock in a New Zealand company requires the prior approval of the Government.71/

In Saudi Arabia, foreign investors may obtain several advantages if Saudi Arabian capital has at least a 25-percent share of the investment.72/

In Spain, foreign investors may acquire interests in Spanish enterprises without specific Government authorization if foreign interests are less than 50 percent of the firm's capital. If the firm's interests exceed 50 percent, the firm must obtain prior authorization from the Minister of Commerce.73/ In addition, internal credit is more difficult to obtain and is subject to more difficult conditions if foreign participation in equity capital amounts to 25 percent or more.74

Authorization Requirements

Most countries on either the national and/or the subnational governmental level require foreign investors to obtain prior authorization in order

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67/ *Id.* at 3475.
68/ Nat'l Assn. of Realtors, *supra* note 2, at 55.
69/ 7 *Martindale-Hubbell Law Directory* 3674.
70/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 18-19.
71/ *Id.* at 17-18.
72/ Nazer, *supra* note 31, at 118.
73/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14, at 19.
74/ *Id.* at 9.

to invest in their territory. In some countries, such as Switzerland, Spain, Finland, Brazil, and New Zealand, prior authorization is required for the acquisition of real estate. In most countries, foreign investment legislation specifies which types or sectors of foreign investment need prior authorization. In some countries, such as Japan and the Dominican Republic, the acquisition of a specified percentage of equity interest requires prior authorization. Prior authorization also is required for elements of foreign investment other than acquisition in some countries. For instance, in New Zealand, the use of internal and external credit requires authorization. In Spain, prior authorization is required for repatriation of capital and income. The decision as to whether to give authorization ordinarily is based on criteria such as sectoral priorities, geographic priorities, and the impact the proposed investment may have on the fulfillment of goals, sometimes as set forth in national and regional development plans, and sometimes set forth in detailed regulations. In some cases, authorization can be made contingent on the foreign investor's fulfillment of certain criteria. A contract and surety bonds may be required as a condition of authorization.

In Australia, the Foreign Takeovers Act requires that proposed foreign takeovers of Australian businesses be screened and obtain approval of the government. Proposals can be rejected if foreigners propose to: (1) acquire voting or nonvoting shares in a corporation, make an agreement concerning the affairs of a corporation, or make an arrangement concerning an Australian business controlled by a corporation; (2) businesses will be controlled by foreigners or their associates; and (3) the result is contrary to "national interest." The holding of a specified minimal percentage of equity is required in order to bring a foreigner within the provisions of foreign investment legislation. If a foreigner fails to notify the Government of a proposed acquisition of substantial shareholding in Australia, the foreigner is subject to a fine not exceeding $50,000.75/

In Austria, the acquisition, possession, and disposition of real estate by foreigners is regulated by the provinces. Most of them require special approval by local authorities prior to all transactions.76/

In Belgium, Government approval is required for the acquisition of one-third capital interest of Belgian enterprises which have an equity over $2.5 million.77/

In Brazil, legislation restricts the acquisition by foreigners of rural land (see section on restrictions on alien investment in certain areas). The legislation provides that the President of Brazil by decree may authorize an acquisition in derogation of the limits contained in the legislation if the rural property is to be used in a project that has priority in the development plans of the country.78/

75/ 7 Martindale-Hubbell Law Directory 3260 (1978).
76/ U.S. Dept. of Commerce, Overseas Business Reports, 76-08 at 22.
77/ 7 Martindale-Hubbell Law Directory 3249.
78/ Brazilian Law 5,709, in O.A.S., supra note 25.

In Denmark, persons not domiciled there or not having been domiciled at an earlier time for at least 5 years can only acquire real estate on approval of the Ministry of Justice.79/

Legislation in the Dominican Republic requires that aliens obtain prior authorization from the executive before acquiring real property and before foreign corporations can establish themselves in the country. Exemptions for such authorization are granted to associations comprised of at least 30-percent ownership by citizens of the Dominican Republic.80/

In Finland, a company in which shares are owned by foreigners must apply to authorities for permission to purchase real estate or to rent real estate for a period of more than 2 years.81/

In France, foreign investment in some sectors such as marine, air, and land transportation, petroleum extraction, banking, and insurance requires authorization from the Government.82/

In Guinea, proposed foreign investments must be submitted to and approved by the Government, after which an agreement is entered into based upon the application.83/

In Indonesia, foreign investment must be approved by the Government, which determines the geographic area in which foreign enterprises can invest in accordance with national and regional development plans.84/

In Japan, foreign investments are subject to governmental approval, which is based in part on whether the applicant is a new or an existing company (see discussions of restrictions on percentage and types of businesses). Foreign investments requiring validation or approval include most acquisition of stock, beneficiary certificates, corporate debentures, international loans, and technological assistance agreements. The Government has much discretion in deciding whether to approve investments.85/

In Kenya, foreign investors applying for and receiving governmental approval obtain benefits such as the right to repatriate profits, funds received from the sale of the investment, and amounts received for a loan. The Foreign Investments Protection Act provides that approval normally will not be given to speculative investments, such as a person purchasing a share of a public company quoted on the Nairobi stock exchange, or to investments which are not of an economic value. In

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79/ 7 Martindale-Hubbell Law Directory 3411.
80/ Id. at 3416.
81/ Id. at 3475.
82/ Id. at 3486.
83/ Guinean Laws, Investment Code, sec. 24, in ICSID, supra note 1.
84/ Indonesian Laws, Law Governing Investment of Foreign Capital, Ch. 4, in id.
85/ 7 Martindale-Hubbell Law Directory 3673-74.

connection with the latter, the change of ownership of an existing building or business will not qualify unless it could be proved that the business or building was purchased for expansion. Mercantile organizations usually are not given approval.86/

In Korea, no immovable assets or titles thereto may be disposed of in favor of nonresidents unless otherwise provided by the Foreign Capital Inducement Law or by a presidential decree based thereon. The Law states further that, except for the cases provided for by the law or presidential decree thereof, the nonresident cannot acquire real estate situated in Korea from other nonresidents, or dispose of such real estate to another person. Governmental approval is required to invest in Korea. In order to obtain approval, foreign investments must fulfill one of the following criteria: projects which greatly contribute to the improvement of Korea's balance of payments; projects which contribute to the development of key industries or public enterprises; or projects included in the Economic Development Plan. Approval also must be obtained before a foreign investor disposes of his investment or alters its status.87/

In New Zealand, the acquisition of certain kinds of land, either by foreign citizens or by companies controlled by foreign citizens, requires approval in accordance with the Land Settlement Act of 1952.88/ Furthermore, all foreign investment in New Zealand, whether direct or in the form of licensing or royalty agreements, requires the prior approval of the Government. Any proposal by a foreign investor to take control of 25 percent or more of the capital stock of a New Zealand company also requires prior approval by the Government through the Treasury and Reserve Bank, in conjunction with the Department of Trade and Industry, when appropriate. To gain approval, foreign investment must meet criteria, such as: the extent to which New Zealand resources, materials, and personnel are used; compatibility with environmental protection and regional development policies; access to foreign technological developments; potential exports and improved productivity; product innovation; and the effect on the balance of payments. An Overseas Investment Commission has been established to advise the Government concerning foreign investment in New Zealand.89/

In Norway, aliens and corporations owned or controlled by aliens require Government authorization to purchase real property, including waterfalls and mines, or to rent it for more than 10 years.90/

In Saudi Arabia, any foreign business wanting to establish an enterprise must obtain a license from the Ministry of Industry. An applicant can

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86/ Kenyan Laws, The Foreign Investment Protection Act, in ICSID, supra note 1.

87/ Korean Laws, The Foreign Capital Inducement Law, in id.

88/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 17-18.

89/ Id.

90/ 7 Martindale-Hubbell Law Directory 3829.

obtain a license only if the object for which it is applying comes within the scope of the regulations for the investment of foreign capital. A special committee reviews all applications and makes recommendations. Foreign investments in Saudi Arabia are limited to projects for economic development and which are for the economic development of the country. A foreign investor wanting to conduct commercial activities must select a commercial agent who is a citizen. If a foreign investor forms a Saudi company with Saudi participation, it must obtain special authorization from the Ministry of Commerce in order to own real property.91/

In Spain, foreign investors must obtain authorization of the government to participate in or to establish an enterprise in Spain.92/ A foreign investor wanting to acquire nonurban property situated in certain areas, such as the Balearic Islands, Galicia, and the Canary Islands, must submit an application, accompanied by a plan showing the layout and location of the property, and obtain prior approval from the Spanish Government. Prior governmental approval must be obtained by foreigners to acquire land in rural areas of over 4 hectares of irrigated farm land and of over 20 hectares of regular farm land. Prior authorization by foreign investors is required to repatriate capital and income.93/

In Sweden, foreigners are not allowed to acquire real property or operate mines without first obtaining a license from the authorities.94/

In Switzerland, nonresident aliens or legal entities in which nonresident aliens have a majority interest must obtain a license to acquire real estate. An application for a license may be rejected unless a justified interest has been demonstrated, such as real estate to serve primarily a trading, manufacturing, or other commercial establishment. Applications to acquire property for personal use may be acted on favorably--such as in the case of dwellings used for vacation homes. Applications to acquire property for investment purposes can be made only for new low-rent housing. In addition, a license is not issued if real estate is situated in territory outside of a building zone recognized by federal zoning or in which nonresidents have already acquired real estate to a disproportionate extent or in a neighborhood in which important military installations are located. Transactions to convey real estate to foreigners who have not obtained a license have no legal effect.95/

Registration Requirements

Countries having legislation requiring that foreign investors obtain approval prior to investing have a *de facto* registration requirement.

91/ Nazer, *supra* note 31, at 117-18.
92/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14, at 18-19.
93/ *Id.* at 19-20.
94/ 7 *Martindale-Hubbell Law Directory* 3459.
95/ *Id.* at 4013.

In addition, in connection with or separate from legislation requiring the obtaining by foreign investors of approval, legislation sometimes requires registration by foreign investors. For instance, Brazilian legislation requires a governmental agency to collect information through registration concerning foreign investment in rural lands, and the forwarding of reports at quarterly intervals to other governmental agencies. In Argentina, Nicaragua, El Salvador, Uruguay, and in the Andean Common Regime, foreign investment must be authorized and must be subsequently registered with the competent national authorities.

In Brazil, the Archives of the Real Property Register is required to maintain a special cadastre, in a book kept for the purpose of the acquisition of rural lands by foreign natural and juridical persons. It must contain: a description of the document of identity of the contracting parties or of their respective acts of organization, in the case of juridical persons; a description of the property, its area, characteristics, boundaries, and geographic position; and a transcription of the authorization by the competent authority if such has been given.96/ The Archives of the Real Property Register is required to remit each quarter to the Ministry of Justice of State to which the Archives are subordinate and to the Ministry of Agriculture a report of the acquisition of rural lands by foreign persons, containing the data required to be reported. If the property is located in an area deemed indispensable to national security, the report also must be forwarded to the general secretariat of the National Security Council.97/

In England, every company incorporated outside the United Kingdom, and establishing a place of business within it, is required under penalty of law to file: a certified copy of its charter, statute, or other instrument setting forth its constitution; a list of directors; and the name and address of some person resident in the United Kingdom authorized to accept service of process on any notices required to be served on the company. A foreign company also must file a statement of its affairs, as is required by public companies incorporated in the United Kingdom.98/

Classification of Alien Investors

Most foreign investment legislation governs investment by alien or foreign natural persons or persons domiciled outside of the territory. In the case of Denmark, for instance, foreign investment legislation applies to persons not domiciled in Denmark or not having been so at an earlier time for at least 5 years.

Foreign investment legislation usually defines the threshold of foreign equity holding of a local enterprise which subjects such foreigners to

96/ Brazilian Law 5,709, in O.A.S., *supra* note 25.
97/ *Id*. Art. 11.
98/ 7 *Martindale-Hubbell Law Directory* 3459.

its legislation. The legislation of many countries reaches only entities with a majority or controlling foreign interest. However, many countries have a less than majority interest threshold. For instance, Finland uses a 20-percent equity ownership test.

The foreign investment legislation of some countries applies a percentage of equity ownership which varies according to the sector regulated. In addition, the foreign investment legislation of some countries requires a minimal monetary value of investment as a threshold for regulating investments.

Another distinction which may be important is whether legislation applies to not only direct, but also indirect investment, such as licensing or royalty agreements as in New Zealand's legislation.

In Australia, the foreign investment legislation focuses on the percentage of foreign ownership or control in terms of voting strength. The legislation allows foreign investors to hold up to a 50-percent equity in mineral resources, but only 25 percent for investment in uranium.[99/]

In Belgium, foreign investors become subject to obtaining governmental approval when they acquire one-third of the capital of a Belgian enterise which has an equity above $2.5 million.[100/]

In Brazil, the legislation concerning foreign investment in rural land applies to: a foreigner residing in the country and a foreign juridical person authorized to operate in Brazil. It also applies to Brazilian enterprises in which foreign natural or juridical persons possess a majority of their capital stock and take part, under any title, and reside or have their headquarters abroad.[101/]

In Denmark, foreign investment laws requiring approval for acquisition of real property apply to persons not domiciled in Denmark or not having been so at an earlier time for at least 5 years. Although foreigners generally must obtain permission to make direct investments, they may invest up to a maximum of 100,000 Danish kronor annually and in certain stocks and bonds without obtaining permission.[102/]

In Finland, a company having more than 20 percent of foreign ownership of its shares must apply for permission to purchase real estate or to rent real estate for a period of more than 2 years.[103/]

In Indonesia, the law concerning investment of foreign capital applies only to direct investment of foreign capital made in accordance with or based upon the provisions of the statute for the purpose of establishing

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99/ U.S. Dept. of Commerce, Overseas Business Reports, 76-15, at 23-24.

100/ 7 Martindale-Hubbell Law Directory 3299.

101/ Brazilian Law 5,709, Art. 1, in O.A.S., *supra* note 25.

102/ 7 Martindale-Hubbell Law Directory 3411.

103/ *Id.* at 3475.

enterprises in Indonesia, and with the understanding that the owner of the capital directly bears the risk of investment. No minimum amount of equity ownership is set forth before a foreign investor "directly" investing is subject to the legislation.104/

In the Japanese legislation on foreign investment, a foreign investor means: a foreigner resident in Japan; an exchange nonresident individual; a foreign corporation; and a Japanese subsidiary or corporation owned or controlled in fact by foreign nations or foreign firms.105/

In New Zealand, the definition of foreign investment requiring prior approval of the Government includes direct investment and investment in the form of licensing or royalty agreements. A percentage of equity holding (25 percent or more) is used to determine the point at which approval by the central bank must be obtained to borrow or raise funds in New Zealand by a company organized in New Zealand and having participation by foreigners. Entities not incorporated in New Zealand also must receive approval.106/

Foreign investment legislation in Norway embraces aliens and corporations owned or controlled by aliens.107/

In Spain, foreign investment legislation requires that any foreign participation in a local enterprise and the establishment of an enterprise by foreigners require governmental authorization. Legislation also covers the purchase of certain real estate by foreigners or Spaniards living abroad.108/

In Switzerland, legislation requires that, to acquire real estate, a nonresident alien or legal entity with alien majority ownership must secure a license.109/

Calvo Clauses Required

In undertaking concession contracts with aliens, Latin American governments often have inserted a "Calvo Clause," under which the foreign investor agrees not to seek the diplomatic protection of his own state and to settle matters arising from the contract in the local jurisdiction. The Calvo Doctrine provides that a foreigner doing business in a country has a right only to nondiscriminatory treatment and that, by entering the country, he impliedly consents to be treated as are its

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104/ Indonesian Laws, Law Concerning Investment of Foreign Capital, in ICSID, supra note 1.

105/ 7 Martindale-Hubbell Law Directory 3673-74.

106/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 18-19.

107/ 7 Martindale-Hubbell Law Directory 3829.

108/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14 at 18-20.

109/ 7 Martindale-Hubbell Law Directory 4013.

nationals. Although initially the majority of jurists and governments denied the validity of such clauses, international tribunals, international conventions, and treaties have since 1926 given increased acceptance to the Clause. The Calvo Clause has had reduced impact in the last few decades since governments have not intervened in investment disputes, except in special circumstances.

Ordinarily, a clause in a contract of private law may not deprive a state of the right of diplomatic protection or an international tribunal of jurisdiction. The agreement in fact may be given such an effect if a tribunal interprets the agreement which confers jurisdiction in such a way as to incorporate the Clause, especially if the alien contractor tries to use diplomatic protection to avoid his contractual obligations. However, since in most cases a foreign investor must exhaust local remedies before seeking to use diplomatic protection, the Clause does not have significance (unless the contract specifically contains a waiver of the local remedies rule). However, the Clause may be important in resolving a contractual dispute if the agreement conferring jurisdiction upon an international tribunal excludes the operation of the local remedies rule, but incorporates by reference the effect of the Calvo Doctrine. In arbitrations, the Calvo Clause has been interpreted to prevent contractual disputes from being the object of diplomatic protection or interstate proceedings in the absence of a denial of justice.

The Calvo Clause is inserted not only in contracts, but also in statutes or constitutions. The Mexican Constitution of 1917 provides:

> Legal capacity to acquire ownership of lands and waters of the nation shall be governed by the following provisons: (1) Only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The nation may grant the same right to aliens, provided they agree before the Ministry of Foreign Relations to consider themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of non-compliance, of forfeiture to the nation of property so acquired.

In Argentina, foreign investment legislation provides that no new investments shall be authorized that will "remove possible controversies or conflict from the jurisdiction of Argentine courts or ...allow subrogation by states or other international persons of the legal actions and rights of investors."110/

Two recent codifications of international law have accepted with significant limitations the Calvo Clause.111/

110/ O.A.S., supra note 25, at 140.

111/ Restatement (Second), Foreign Relations Law of the U.S., sec. 202; Sohn and Baxter, Draft Convention on the International Responsibility of States for Injuries of Aliens, Art. 22(5), 55 Am. J. Int'l. L. 548 (1961).

The Calvo Clause should affect primarily U.S. persons investing in large-scale commercial, development, or business operations in Latin America.

Exceptions for Types of Alien Investors

In some cases, foreign investment legislation provides for exceptions to restrictions on foreign investors. Foreigners who inherit property often are given exceptions from the application of restrictions which preclude aliens from owning real property. Such exceptions also are set forth in treaties of friendship, commerce, and navigation. Exceptions may depend on: the extent to which local persons are given equity ownership; concurrence with national and regional economic priorities; and membership in a regional economic organization.

In Brazil, Supplementary Act 45 of January 30, 1969, concerning the acquisition of rural property by foreigners, makes an exception in cases in which property is transferred as a result of death.[112]

In Denmark, an exception from obtaining governmental approval applies to the acquisition of real property by aliens through inheritance and matrimony. In addition, approval is not required for corporations and citizens belonging to the European Economic Community whose purpose is to establish branches or agencies in Denmark.[113]

In the Dominican Republic, associations require prior authorization from the Government to acquire real property. However, associations having at least 30-percent local ownership are exempt.[114]

In Iran, business ventures undertaken by foreigners are encouraged if they include substantial Iranian private sector participation. However, exceptions can be made if the Iranian Government deems the investment in the national interest and if no local partner is available.[115]

Financing Restrictions

Financing restrictions concerning foreign investment are of two types: restrictions on the use of external credit and restrictions on the use of internal debt. These two types of restrictions often are found in separate pieces of legislation.

The ability to use external sources of financing may be an important factor in investing in real estate abroad. In some countries, foreign investment control specifically embraces the inflow of external financial resources. Since the borrowing of funds from abroad substantially

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112/ O.A.S., *supra* note 25, at 140.
113/ 7 *Martindale-Hubbell Law Directory* 3411.
114/ *Id.* at 3416.
115/ Nat'l Assn. of Realtors, *supra* note 2, at 55.

affects the balance of payments in countries receiving foreign capital, especially due to the loss of currency in amortizing and paying interest on loans, governments want to restrict the use of external loans.

In some countries, an enterprise must obtain prior authorization from the competent authority and then register the signed contract. In some countries, the law governs the form of repayment of loan and limits the rate of interest to be applied to a loan (e.g., Norway).

Most countries accept, either explicitly or implicitly, capitalization of foreign credit. Some countries differentiate between foreign loans to independent enterprises or to enterprises within the same corporate system. Other countries do not make such differentiation. Some countries provide that the real rate of interest paid by an enterprise shall be determined by the competent authority, and should be closely tied to conditions in the financial market of the country in which the transaction originated.

In some countries, laws set limitations or prohibitions on endorsing or guaranteeing the external credit obligations of foreign enterprises. For instance, the Andean Common Regime forbids member governments from endorsing or guaranteeing the external credit contracts of foreign enterprises, through either official or semiofficial institutions, unless the state owns capital in the enterprise. In Brazil, the National Treasury or official credit institutions are prohibited from guaranteeing external loans for foreign enterprises, except by decree of the executive.

Some countries have laws which give the competent authorities the power to establish general limits on external indebtedness. In some countries, such as Argentina, the Central Bank can prescribe general or sectoral limits.

The ability to use local financing sources is an important activity related to investment in real estate abroad. However, since credit is deemed scarce in some countries, some governments limit its use by foreigners. When a U.S. multinational enterprise has its foreign subsidiary borrow on the local market, the foreign subsidiary may use the standing of its parent to gain advantages over the local firms competing for credit. If a foreign subsidiary of a U.S. parent uses local credit to finance real estate ventures, and then remits the bulk of either the income or the capital, negative impacts may result for the balance of payments. Also to the extent foreign subsidiaries of U.S. corporations successfully obtain access to credit, the local firms cannot use the scarce credit.

Some countries--such as Argentina, Uruguay, Spain, and the Andean Common Regime--expressly restrict the type of credit available to foreign enterprises. For instance, Argentina, Spain, and Uruguay allow only "short-term" internal credit to foreigners. In addition, Uruguay requires that it must be used for the operational needs of the business.

Some countries, such as Australia and Spain, limit the use of internal credit according to the percentage of local equity ownership.

In Argentina, the Government imposes on each investment contract a maximum limit on the foreign investor's internal indebtedness to natural or juridical persons that are domiciled in the country. Such use on internal credit is restricted by law to short-term internal loans (e.g., obligations assumed by enterprises to satisfy business needs for not more than 1 year) and is subject to conditions set for each sector by the Central Bank of Argentina.116/

In Australia, foreign interests can gain access to fixed interest borrowings within guidelines estabilshed by the Australian Government. These guidelines require that all enterprises with more than 25 percent of the shares belonging to foreign interests must consult the Reserve Bank concerning proposed fixed interest borrowings in Australia.117/

In Austria, the Central Bank, to cope with inflation, has enacted legislation to limit bank credit expansion, to restrict nonresident buying of Austrian bonds, and to limit credit to foreigners for the purchase of land and housing.118/

In Brazil, enterprises--the majority of whose capital and votes are held by foreigners as well as subsidiaries of foreign enterprises--are not permitted access to official credit sources until after they have begun operations. However, exceptions are made for projects which are of prime interest to the national economy. In addition, official financial institutions may not give credit and resources provided by public investment funds may not be used for new investments in the fixed assets of a foreign enterprise unless the investments are made in an economic sector of prime national importance, as enumerated by executive decree.119/ The use of external credit for investment in Brazil must be authorized and registered by the Central Bank, after an analysis of the aspects of the transaction such as the interest rate, term of repayment, and impact on the balance of payments.120/

In New Zealand, an entity which is not incorporated in New Zealand or a company which is incorporated in New Zealand but of which 25 percent or more of the voting capital is controlled by foreigners cannot borrow or raise funds in New Zealand unless it has the approval of the central bank. Approval also must be obtained to raise funds abroad. When it approves the raising of local financing or the expanding of local credit, the Government may request some or increased local equity participation. The Government also exercises control over credit by requiring that licenses be obtained for import requirements, especially plant and machinery.121/

116/ O.A.S., supra note 25, at 185.

117/ U.S. Dept. of Commerce, Overseas Business Reports, 76-15, at 21.

118/ U.S. Dept. of Commerce, Overseas Business Reports, 76-08, at 17.

119/ O.A.S., supra note 25, at 178-80.

120/ Id. at 196-99, 209.

121/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 18-19.

In Norway, a license must be secured for transfer in and out of all currency. The establishment in Norway of joint stock companies or corporations owned or controlled by aliens also requires a currency license. The Government also limits the amount of interest which can be paid by investments in Norway on external loans.[122/]

Spain imposes restrictions on the use by foreign investors of both internal and external credit. Companies having foreign participation can obtain credits for up to 18 months on the same conditions as those applying to Spanish companies. The access to internal credit depends on the percentage of foreign participation in equity capital. Spanish companies with foreign participation of less than 25 percent can obtain credits for more than 18 months without restriction. Spanish companies with foreign participation in their equity capital of 25 percent or more are limited in their access to the domestic finance market. Such companies are limited in their borrowing of medium- and long-term funds on the domestic market to 50 percent of their total capital and reserves. Increased local credit may be obtained if the amount of increased local credit is matched by foreign credits. There are no restrictions on short-term borrowings.

To borrow from foreign sources, all Spanish companies, regardless of whether they have foreign participation, must obtain authorization from the Bank of Spain. In determining whether to authorize borrowing abroad, the Bank uses the following criteria: the rate of interest; the term; and the purpose of the proposed loan, as well as the ratio of the borrower's capital to the loan. Approval also gives the Spanish company the right to subsequently transfer interest and principal payments.[123/]

In Uruguay, foreign entities within the law on foreign investment have access only to short-term internal credit (not to exceed 1 year) and may not utilize medium- or long-term credit.[124/] Uruguayan entities with foreign capital which want to use external credit must obtain, in each case, the approval of the competent authority. The terms of external loans must be recorded in the currency of origin in the special register which is maintained for this purpose by the Central Bank.[125/]

In the Andean Common Regime, Decision 24 provides that foreign enterprises may have access only to internal credit on a short-term basis and under the conditions established in the regulations on this matter issued by the ANCOM Commission. External credit which is to be used by a national or foreign enterprise must be authorized by and registered with the competent national authority. The latter establishes regulations for external indebtedness for a certain term. Monetary transfers abroad to pay for external loans must comply with the real annual rate of interest established by the competent national authority.[126/]

122/ 7 Martindale-Hubbell Law Directory 3834.
123/ U.S. Dept. of Commerce, Overseas Business Reports, 76-14, at 9.
124/ O.A.S., *supra* note 25, at 181.
125/ *Id.* at 210.
126/ *Id.* at 211.

Regulations Governing Repatriation of Capital and Transfer of Profits

Virtually all countries have legislation in force permitting expressly or implicitly the right of repatriation of capital. In many countries, legislation requires that the repatriable capital be set forth in the initial investment contract and subsequent registration. Authorized reinvestments then are added to the investment contract. In some cases, the legislation provides for a quota of repatriable capital or at least requires that the amount of capital to be repatriated not jeopardize the continuation of the enterprise.

Some countries prohibit the repatriation of foreign capital until a certain amount of time has elapsed after the investment began. For instance, Argentine, Uruguayan, Korean, and Greek laws require 5 years, 3 years, 2 years, and 1 year, respectively.

Some countries restrict the repatriation of foreign capital in circumstances of critical balance of payments. For example, Argentina and Brazil authorize the postponement of the remittances in times in which balance of payments are experiencing critical difficulties.

All countries consulted permit the transfer of profits. Usually the conditions governing the transfer of profits are set forth in the investment contract with the government. Many countries put a ceiling on the amount of profits which may be remitted. For instance, in Argentina, the total amount of remitted profits may not exceed 12.5 percent, or a percentage which exceeds by four points the prime interest rate paid for short-term (180-day) deposits, in the currency in which the capital is registered. The maximum amount transferable is the higher of the two percentages. In the Dominican Republic, remittances abroad of profits are limited to 18 percent annually, unless permission is obtained to remit abroad a higher percentage of profits in exceptional circumstances. In Greece, profits may be remitted annually at the rate of 12 percent of imported equity capital.

Many countries have foreign investment laws which guarantee the conversion of profits authorized for transfer into the currency in which the foreign capital is registered. For example, the Andean Common Regime provides for the transfer of profits in freely convertible currencies. The laws of Argentina, Brazil, Indonesia, Kenya, and Uruguay all guarantee the transfer of funds in freely convertible currencies.

Some countries, such as Brazil, may allow the remittance of profits, but may impose a supplementary tax thereon, usually at a progressive rate of taxation. In other countries, a tax deferral or exemption is granted for foreign enterprises which reinvest profits in lieu of remitting them abroad.

Some countries have laws providing that exportable profits which have not been transferred within a certain period from the date of authorization, as well as profits surpassing fixed percentage limits, automatically become national capital.

In some countries, legislation allows for additional restrictions to be imposed in times of serious disequilibrium in the balance of payments.

The legislation of some countries provides that prior to remitting profits, all of the tax and financial obligations of the foreign enterprise must be satisfied.

In Austria, a permit must be obtained to transfer proceeds from the liquidation of foreign investments, but it usually is obtained without difficulty.[127/]

In Argentina, the amount and timing of capital repatriation is set forth in the placement contract. It sets an annual quota of repatriation, which may not exceed 20 percent of the repatriable capital, and which must be compatible with the continued operation of the enterprise. In addition, the investment contract must set an initial time period, not less than 5 years from the date of approval, during which no repatriations can be made. If circumstances develop in which the balance of payments become critical, repatriation may be deferred.[128/] The original investment contract in Argentina also determines the amount of profits which foreign investors can remit from investments in Argentina. The total remitted profits may not exceed 12.5 percent, or a percentage which exceeds by four points the prime interest rate paid for short-term (180-day) deposits, in the currency in which the capital is registered. The maximum amount transferable is the higher of the two percentages.[129/]

In Brazil, foreign capital can be repatriated subject to possible temporary limitations due to balance of payments difficulties.[130/] The transfer of profits from foreign capital must be authorized by the Superintendency of Currency and Credit, which is the agency responsible for the registry of foreign investments. Supplementary income tax is imposed on transferred profits if these exceed 12 percent of capital and registered reinvestments during a period of time (3 years). The amount of supplementary tax increases according to the amount of profit to be transferred. In addition to the tax related to the total profit to be transferred, an additional 20 percent is imposed when the economic activity of the foreign enterprise is deemed of minor importance to the national economy. Some real estate investments are likely to be considered of minor importance.[131/]

In Denmark, remittances of capital invested in Denmark by foreigners may occur without difficulty.[132/]

In the Dominican Republic, remittances abroad of profits are limited to 18 percent annually. However, permission may be granted to remit abroad

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127/ U.S. Dept. of Commerce, Overseas Business Reports, 76-08, at 22.
128/ O.A.S., _supra_ note 25, at 333.
129/ _Id_. at 287.
130/ _Id_. at 322.
131/ _Id_. at 288.
132/ 7 _Martindale-Hubbell Law Directory_ 3411.

a higher percentage of profits in exceptional instances. Payments are to be sent abroad for obligations contracted after May 1964, and advance approval of the loan or contract is required.[133]

In Greece, foreign capital may be repatriated beginning 1 year after the importation of such capital and may not exceed 10 percent annually of the amount imported. Profits may be transferred annually at the rate of 12 percent of imported equity capital. In the case of loan capital from abroad, 10 percent per year for the payment of capital may be remitted. Enterprises engaged in exports are allowed higher remittance rates.[134]

In Guinea, separate provisions apart from exchange control regulations govern repatriation of foreign investments which secure investment approval. These enterprises are allowed to remit from Guinea capital invested by way of amortization at the annual rate of 10 to 15 percent of the amount invested during the preceding year. In addition, investors or money lenders may be authorized to transfer for each year the entirety of interest and at least 20 percent of their net profits.[135]

In Indonesia, foreign enterprises have the right to transfer in the original currency of the invested capital, at the prevailing exchange rate, for: accrued profits, after payment of taxes and other financial obligations in Indonesia; costs related to employing foreign personnel; depreciation of capital assets; compensation in case of nationalization; and other costs to be determined in due course.[136]

In Italy, the right of foreign enterprises to repatriate funds resulting from their investments in Italy depends on whether the investment meets the criterion of being a "productive enterprise." If the investment is considered as the establishment of a new productive enterprise or the enlargement of a similar enterprise already in existence, all dividends and profits accrued from such investment can be remitted abroad without limitation in terms of either time or amount. However, if the investment is made in an enterprise other than those mentioned above, the dividends and profits accrued from such investments which can be remitted abroad are limited to an amount not exceeding 6 percent annually of invested capital.[137]

In Kenya, foreign enterprises obtaining investment approval prior to investing in Kenya may repatriate for the period to which the approval extends in the approved foreign currency and at the prevailing rates of exchange: the profits, after taxation, of the investment of foreign assets; the approved proportion of net proceeds of the sale of all or

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133/ *Id.* at 3420.

134/ U.S. Dept. of Commerce, Overseas Business Reports, 76-17, at 13.

135/ Guinean Laws, Investment Code, sec. 24:2A-5.6, in ICSID, *supra* note 1.

136/ Indonesian Laws, Law Governing Investment of Foreign Capital, sec. 1:2A-5.6, in ICSID, *supra* note 1.

137/ 7 *Martindale-Hubbell Law Directory* 3462.

any part of the approved enterprise, either in liquidation or as a going concern; and the principal and any loan specified in the certificate.138/

In Korea, a foreign enterprise, having obtained investment approval, may repatriate up to 20 percent of the capital to which it subscribed every year after 2 years from the date on which the enterprise concerned commences its business operation. The remittance of profits and dividends accrued from stocks or shares owned by foreign investors also is guaranteed. The remittance abroad of capital and interest under a cash loan contract, the value and interest under a capital goods inducement contract, or the value under a technological inducement contract is guaranteed according to the authorization granted by the Government when it approves an investment application.139/

In the Netherlands, any transaction by which the rate of exchange may be influenced is forbidden, except by previous permit. In general, the transfer by foreign investors of their earnings is not restricted. Interest payed on loans and contract amortization of interest to nonresidents is transferable provided the loan is required for participation by a nonresident in share capital of a Netherlands company, after which dividends are transferable. If the amount of proceeds has been fixed in advance in accordance with good business practices, invested capital is also transferable.140/

In New Zealand, foreign capital and gains thereon ordinarily can be repatriated, if the original funds have entered New Zealand through the banking system or in some other equivalent approval form, and if the formal approval of the Reserve Bank of New Zealand is obtained. The New Zealand Government permits the remittance of profits, interest, and dividends earned by foreign investors from both portfolio investments and loan investments. A prerequisite of any remittance is that the foreign investor must apply for and receive the approval of the Reserve Bank pursuant to exchange control regulations. However, for both remittances and the repatriation of capital, the approval of the Reserve Bank usually is only a technical requirement and will be automatic after an auditor's certificate or the required proof of the remittance of the investment funds through the banking system has been secured.141/

In the Andean Common Regime, Decision 24 gives the foreign investor the right to repatriate invested capital derived from selling stocks or other rights to domestic investors, and from the liquidation of the enterprise. Repatriable capital is deemed as the amount of the initial direct foreign investment, registered and effectively invested, plus the

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138/ Kenyan Laws, The Foreign Investments Protection Act, in ICSID, supra note 1.

139/ Korean Laws, Foreign Capital Inducement Law, sec. 12:2A-5.3, 5.4, in ICSID, supra note 1.

140/ 7 Martindale-Hubbell Law Directory 3748-50.

141/ U.S. Dept. of Commerce, Overseas Business Reports, 76-18, at 20-21.

reinvestments authorized and effected in the same enterprise, minus net losses. If an enterprise is liquidated, the differences between the real value of the assets and the repatriable capital shall be considered as capital gains, and can be repatriated after taxes have been paid.[142/] Decision 24 also gives foreign investors, pursuant to authorization of the competent national authority, the right to transfer abroad the verified net profits in freely convertible currencies. The total amount is limited to 14 percent of the investment.[143/]

Summary of Section

The potential restrictions which are contained in the domestic laws of the countries selected for this report are diverse. The restrictions vary both as to their quantity and their nature. The severity of a restriction or a combination of restrictions vary according to the purposes of the investors.

Most countries also have incentive legislation concerning foreign investment. The incentives include exemptions and deferrals from taxation, reduction of taxes for certain periods, and reduced duties on imports needed for the activity for which the incentives apply. Often the incentives given apply to enumerated activities or sectors. In other cases the incentives will apply if the investor meets criteria listed in the legislation. The incentive legislation often gives guarantees concerning future treatment, such as guarantees against expropriation or against future raising of taxes, or other types of treatment.

PUBLIC INTERNATIONAL LAW RESTRICTIONS AND PROTECTIONS

Many potential protections and restrictions concerning investment by U.S. persons in real estate abroad are set forth in international law principles applicable to such transactions. The three primary sources of public international law applicable to transnational investments are: customary international law; bilateral treaties; and multilateral treaties.[144/] This discussion highlights the three primary sources of public international law affecting investments by U.S. persons in foreign real estate.

Customary International Law

According to classic international law doctrine, only states can be subjects of international law. As a result of this doctrine, although an individual's property is protected by international law, an individual can only rarely pursue international as contradistinguished from

142/ O.A.S., *supra* note 25, at 328, 335.

143/ *Id.* at 281-82.

144/ For a more comprehensive list of sources of international law, see Art. 38 of the charter of the International Court of Justice.

municipal remedies against a foreign state which may have injured his property. Ordinarily, an individual may only pursue remedies pertaining to property through the intervention of his own state.145/

The International Court of Justice (I.C.J.) is the major tribunal for litigation which is based on violations of international law. The I.C.J. only hears disputes between nations. The I.C.J. does not have jurisdiction over a dispute unless the states which are parties thereto consent to litigate. The consent may be on a case-by-case basis, through a treaty provision, or by a unilateral declaration. The United States has declared, with a reservation, that it grants jurisdiction to the I.C.J. for any dispute with another nation which also has recognized the Court's compulsory jurisdiction. The U.S. reservation, which has been subject to much criticism by international jurists, withdraws its recognition if in its opinion, the dispute concerns matters "essentially within the domestic jurisdiction of the United States."146/

Initially, a U.S. claimant should seek relief through whatever channels (e.g., judicial, executive, or legislative) are available to him in the foreign country. A U.S. person who is aggrieved by having his property harmed by actions for which another state may be responsible can try to persuade the U.S. Government (the State Department through the Office of the Legal Adviser) to intervene on his behalf. The Office of the Legal Adviser,147/ in deciding whether to recommend that the U.S. Government intervene on behalf of the claimant, will consider the following factors: respect for the claimant's rights; consistency of the claims with international law; the effect of any action by the U.S. Government on political relations with the foreign country; and the impact that advocacy of a claim may have as a precedent in future cases.148/ In the event the State Department decides to intervene, copies of the claim are transmitted to the foreign government. The State Department is free to pursue a wide range of remedies, including, usually as a last resort, recourse to international tribunals. If the dispute is with a foreign state covered by a treaty of the United States, the aggrieved U.S. person also may bring an action in a U.S. Federal court.149/

Another issue which arises from investments by U.S. persons abroad is whether the U.S. Government can or should extend protection to a U.S. corporation or to U.S. shareholders of a corporation. The present practice of the U.S. Government has been summarized as follows: (a) in general, the United States will take up a claim on behalf of corporations organized in the United States if 50 percent or more of their stock is

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145/ Statute of the International Court of Justice, Art. 34, para. 1, in Bishop, Cases and Materials on International Law 1083 (3d ed. 1953).

146/ 61 Stat. 1218; 15 Dept. of State Bull. 452 (1966).

147/ See Bibler, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, 56 Am. Jur. Int'l L. 633 (1962); Lillich & Christensen, International Claims: Their Preparation and Presentation (1962).

148/ Steiner & Vagts, Transnational Legal Problems 208 (1976).

149/ U.S. Const. art. III, sec. 2.

owned by U.S. citizens; (b) the United States also will assume a claim on behalf of a U.S. shareholder if the U.S. share of ownership is significant (which usually is regarded as 25 percent or more) and certain circumstances set forth in Section 172 of Restatement (Second), Foreign Relations Law of the United States are met.[150/] The practice is not uniform. In the World War II period, bilateral agreements between the United States and other nations were concluded to settle disputes relating to expropriation of foreign investments. These agreements illustrate how nations take up a claim for their nationals.

An important issue which arises under customary international law concerns the rights of aliens to acquire, own, and dispose of real property, and to have other tenurial rights. It appears that international law does not require a nation to permit aliens to acquire real estate.[151/] Once an alien owns land, customary international law precludes a state from expropriating the property without procedural safeguards and just compensation.[152/]

Bilateral Treaties

Three types of bilateral treaties may substantially affect investment by U.S. persons in foreign real estate. They are: Treaties of Friendship, Commerce, and Navigation (FCN); Investment Guarantees; and Double Taxation Conventions.

Treaties of Friendship, Commerce, and Navigation.

Treaties of Friendship, Commerce, and Navigation (FCN) provide for the protection of U.S. persons, natural and juridical, and of the property and interests of U.S. persons in the territory of the other contracting party. This discussion is concerned only with elements of FCN treaties pertaining to rights of U.S. persons investing in foreign real estate.

The scope of protection to U.S. persons afforded by FCN treaties may be substantially limited by exceptions clauses, whether of general type applying to the treaty as a whole or applicable to clauses setting forth more specific rights. An example of a general exception clause generally found in the newer commercial treaties allows a contracting state to impose restrictions relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials.[153/] An example of a more restrictive exceptions clause allows a contracting state to deny certain advantages under the treaty to a company in which nationals of any third

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150/ Steiner & Vagts, supra note 148, at 239-40.

151/ Roth, The Minimum Standard of International Law Applied to Aliens 185-186 (1969).

152/ See Steiner & Vagts, supra note 148, at 357-495.

153/ Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, U.S.-Germany, Art. XVIII, para. 1(e), 7 U.S.T. 1849, T.I.A.S. No. 3593, 273 U.N.T.S. 3.

country or countries own directly or indirectly the controlling interest.[154] For example, West Germany would have grounds to deny a U.S. corporation in which 51 percent of the stock was owned by a New Hebrides trust or, in the absence of majority shareholding, in which a foreign entity had indirect control such as through a voting trust.

In providing for a standard of treatment for aliens, two primary standards are used: national treatment and most-favored-nation treatment. A treaty containing a guarantee of national treatment provides that a foreign country will not discriminate between U.S. nationals and its own citizens. A treaty with a guarantee of most-favored-nation status ensures that U.S. persons shall receive in the territory of the contracting state treatment not less favorable than the most favorable treatment afforded any other foreign nationals. Even if a U.S. person can claim only most-favored-nation treatment (MFN), if a treaty with another country grants national treatment regarding the same right, the U.S. person, by virtue of the MFN provision, also is guaranteed national treatment. The FCN treaties usually are concluded for an initial period of 10 years and are indefinite thereafter unless and until terminated upon the giving of 1 year's formal notice.[155]

This discussion highlights only the salient aspects of FCN treaties relating to investment by U.S. persons in foreign real estate. It should be emphasized that, because no two FCN treaties are alike and since they may contain exceptions and qualifications, this discussion of FCN treaties is necessarily superficial. However, FCN treaties can be characterized according to the era in which they were signed. This treatment discusses the following aspects of FCN treaties relating to investment by U.S. persons in foreign real estate: the leasing of land; the acquisition, owning, and holding of land; the exploitation of mineral resources; the inheritance of or succession to property; personal property; the rights of companies; the expropriation of property and the right to compensation; judicial remedies; and internal taxation.

In the FCN treaties concluded prior to 1923, many provisions permitted the <u>leasing of land</u>, many of them by means of the most-favored-nation treatment.[156] Some FCN treaties, albeit prohibiting U.S. citizens from purchasing land, permitted the renting or leasing of land.[157]

Between 1923 and 1946, the 11 FCN treaties followed a model which permitted U.S. nationals in the contracting state's territory to lease land on a national and MFN basis for residential, religious, scientific, philanthropic, manufacturing, commercial, and mortuary purposes.[158]

154/ <u>Id.</u> Art. XVIII, para. 1(e).

155/ Walker, <u>Modern Treaties of Friendship, Commerce & Navigation</u>, 43 Minn. L.R. 805, 809 (1958).

156/ <u>See</u>, <u>e.g.</u>, Treaty of Friendship, Commerce, and Navigation, Feb. 26, 1871, U.S.-Italy, Art. 22, 63 Stat. 2244, T.I.A.S. No. 1871.

157/ <u>See</u>, <u>e.g.</u>, Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, Art. 3, 33 Stat. 2105, T.S. No. 422.

158/ Wilson, U.S. Commercial Treaties and International Law 147 (1961).

Most of the FCN treaties concluded after 1946 permit U.S. persons to lease land. Three treaties, which are in a more abbreviated form than the normal FCN treaties, provide in a most-favored-nation standard that U.S. nationals and corporations can lease real property needed for residence or for the conduct of activities allowed under the treaty.159/ The more comprehensive FCN treaties also give U.S. persons national treatment in the acquisition and tenure of such leaseholds as might be necessary to carry out any right set forth in the treaty, such as industrial or residential use.160/

In the treaties entered into before 1923, disagreements arose in the United States concerning the advisability of providing reciprocal rights for nationals in acquiring, owning, and holding of land. Some treaties concluded in the middle of the 19th century did give U.S. persons the right to acquire real property in the contracting party's territory. For example, the Treaty of Amity, Navigation, and Commerce with El Salvador, signed in 1850, provided that the citizens of the United States had the power to purchase and hold lands, and all kinds of real estate. Similarly, the Treaty of Friendship, Commerce, and Reciprocal Establishments with Switzerland gave U.S. citizens, subject to the constitutional and legal provisions, as well as Federal, State and cantonal laws, the right to acquire, possess, and alienate property.161/

Some of the early FCN treaties do not contain provisions concerning the acquisition of land because in several cases American negotiators, finding that the other country did not discriminate against aliens, accepted the favorable laws and did not try to add to them.162/

In the period between 1923 to 1937, FCN treaties tended not to set forth broad or specific provisions concerning the right to acquire real property.163/ However, the treaty with Siam, signed in 1937, departed from the general model, and provided that "in all that relates to the acquisition, possession, and disposition of immovable property," U.S. persons in Siam were subject exclusively to the applicable laws of the situs of such immovable property.164/ Specifically, U.S. persons received most-favored-nation treatment in Siam under condition of reciprocity as follows:

159/ See, e.g., The Treaty of Amity and Economic Relations, Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. 2864; Treaty of Amity, Economic Relations and Consular Rights, August 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853; U.S.-Muscat and Oman, Treaty of Amity, Economic Relations, and Consular Rights, Dec. 20, 1958, 11 U.S.T. 1835, T.I.A.S. No. 4530.

160/ See, e.g., Convention of Establishment, Dec. 21, 1960, U.S.-France, Art. VII, 11 U.S.T. & O.I.A. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Navigation, and Commerce, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593.

161/ 10 Stat. 891 (1850); U.S.-Switzerland Treaty of Friendship, Commerce, and Navigation, Art. I, 11 Stat. 587 (1851), T.S. 353.

162/ Wilson, Natural Resource Provisions in United States Commercial Treaties, 48 Am. J. Int'l L. 355, 369 (1854).

163/ Id. at 372.

164/ 53 Stat. 1731 (1939).

> It is expressly agreed that nationals of the United States...including corporations...who are legal residents of or organized under the laws of any state, territory or possession of the United States...which accords to nationals of Siam the right to acquire, possess and dispose of immovable property, shall, in return, be accorded all the rights respecting immovable property in Siam which are or may hereafter be accorded to the nationals, including corporations, partnerships or associations of any other country, upon the principle of nondiscriminatory treatment.[165]

In the period after 1946, the United States concluded commercial treaties setting forth rights to acquire and possess real property. A clause ordinarily set forth in these treaties limits the rights of U.S. persons to acquire and possess land in foreign states to those which nationals of a contracting state have in the State, Territory, or Possession of the United States in which the U.S. person or entity is domiciled. In this way, the U.S. could obtain rights for its nationals while simultaneously accommodating the rights of other states to regulate real property. For instance, in the treaty with Italy, U.S. persons in Italy were to be allowed to acquire, own, and dispose of such property and interests, on conditions no less favorable than those accorded to Italians by the American States, Territories, or Possessions which are respectively concerned. Although the treaties with Uruguay, Colombia, and the Netherlands contain similar provisions, they do not specify that national treatment is a ceiling.[166]

In many of the later treaties, provisions with respect to acquiring real property are not clearly stated and often can be understood only in connection with other provisions of the treaty. In these treaties the acquisition and ownership of real property is made subject to the applicable laws of the situs. In addition, in the Treaty with Ireland, U.S. nationals and companies can possess and occupy real property "incidental to or necessary for the enjoyment of rights" secured by the treaty.[167] Similarly, rights of U.S. persons for the acquisition and ownership of real property are embraced by providing that U.S. nationals and companies have, in addition to leasing rights specifically enumerated, "other rights in real property permitted by the applicable laws of..." the foreign country in question.[168] To fully understand the rights accorded to U.S. persons in such treaties to acquire and own real property requires a careful reading of several other FCN treaty articles, especially where exceptions are provided.

165/ Wilson, *supra* note 158, at 147.

166/ *Id.* at 148.

167/ Art. VII, U.S.-Ireland, Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155.

168/ *See*, *e.g.*, U.S.-Germany FCN Treaty, signed Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593, 273 U.N.T.S. 3.

Some treaties concluded before 1923 contain provisions on the exploitation of mineral resources. The treaty of 1850 with El Salvador gave to U.S. citizens the right to engage in mining on a national treatment basis.169/ The Treaty of 1870 with the same country contained an article setting forth similar rights. However, the treaty of 1881 with Madagascar, in which American citizens and their protegés were accorded the privilege of leasing, provided that the latter privilege should "not be construed as a right to build fortifications...nor to mine on the lands; and should any mineral be accidentally found on such lands, they are to be left to the disposition of Her Majesty's Government, and no agreement will be valid made between the parties to avoid the clause relative to minerals."170/

The commercial treaty of 1903 between the United States and China allows U.S. citizens to undertake in China "mining operations and other business relating thereto" upon compliance with the new regulations and conditions to be imposed upon Chinese subjects and foreigners alike.171/ This provision was agreed to by the Chinese negotiators after they initially had been forbidden to discuss the article on mining, and had then only wanted to agree to general provisions.172/

The commercial treaties which the United States concluded, starting in 1923, had provisions for most-favored-nation treatment for mining, but with a reciprocity clause to comply with the requirements of the U.S. Mineral Leasing Act of 1920, which requires that an individual lessee be a U.S. citizen, specifically excludes alien corporations from leasing lands available under this Act,173/ and allows aliens to hold interests in corporations with interests in mineral leases only if the laws of the alien's country do not deny similar privileges to U.S. citizens.174/

Since World War II, U.S. commercial treaties have made provisions concerning mining consistent with the Mineral Leasing Act. In the treaty between the United States and Nationalist China, a most-favored-nation standard is provided for mining.175/ In addition, the provisions concerning participation by U.S. nationals and companies in corporations organized under the laws of Nationalist China, a reciprocity clause governs stock ownership in corporations engaged in mining on public lands.176/ In the U.S.-Italian FCN treaty, U.S. citizens have a right

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169/ 10 Stat. 891 (1850).

170/ 22 Stat. 952 (1881).

171/ Art. VII, U.S.-China, Treaty of Friendship, Commerce, and Navigation, Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

172/ Wilson, *supra* note 162, at 371-72.

173/ 30 U.S.C. sec. 181 *et seq*.

174/ 43 C.F.R. 3102-1-1(a) (1976) (oil and natural gas leases); 43 C.F.R. 3502.1-1(a) (leases for other minerals).

175/ Art. V, U.S.-China, Treaty of Friendship, Commerce, and Navigation, Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

176/ *Id*. Art. IV(1).

to engage in mining in Italy on a most-favored-nation basis.[177] However, in the U.S.-Irish treaty, the general most-favored-nation rule is expressly excluded from applying to mining activities. In addition, mining is not included in the part of the treaty concerning participation by U.S. nationals and companies in Irish corporations engaged in enumerated types of activities.[178]

In the treaty with Israel, a broadly worded provision in a national treatment context governs the undertaking of business activities and participation by U.S. persons in domestic corporations. However, Israel reserves the right to limit the degree to which U.S. citizens may undertake or have interests in "the exploitation of land or other natural resources." Furthermore, Israel has the right to require that rights to undertake mining on the public domain shall depend on reciprocity, although a most-favored-nation clause applies "in any event" to these activities.[179] Similar clauses are set forth in the U.S.-German treaty.[180] In addition, under the latter treaty, Germany may apply measures concerning fissionable materials, radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable materials.[181] The Japanese treaty contains provisions similar to those in the U.S.-Israel treaty mentioned above, but it also provides that Japan has the reserved right of imposing "new limitations" upon the extent to which aliens are given national treatment as to enumerated activities such as the exploitation of land or other natural resources. However, restrictions may not be applied to enterprises owned or controlled by treaty aliens at the time new limitations are enacted. Japan can make the right to engage in mining contingent upon reciprocity. In addition, with respect to enumerated activities which include the exploitation of natural resources, Japan is not obligated by the general most-favored-nation clause to accord to Americans treatment more favorable than that accorded to Japanese by the American States or Territories to which these Americans, respectively, are domiciled.[182]

Commercial treaties concluded by the United States prior to 1923 contain general clauses which provide that U.S. persons who may, by reason of alienage, be disqualified from inheriting or succeeding to real property in the foreign contracting state, have the right to dispose of the realty (usually during a period of 3 to 5 years), and to realize the

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177/ Arts. II(2), IV, U.S.-Italy, Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965.

178/ Art. VI(2), Protocol, para. 4, U.S.-Ireland, Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155.

179/ Art. VII, Protocol, para. 4, U.S.-Israel, Treaty of Friendship, Commerce, and Navigation, Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948.

180/ Art. VII, U.S.-Germany, Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. 3593.

181/ *Id.* Art. XXIV(b).

182/ Art. VII, para. 4, U.S.-Japan, Treaty of Friendship, Commerce, and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

proceeds therefrom, without being subjected to taxation discriminatory from that which citizens or inhabitants of the state where the money was situated.183/ This provision is still found in most of the FCN treaties of the United States. For example, the U.S.-German treaty provides:

> ...nationals and companies of either Party shall be accorded national treatment, within the territory of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years to dispose of it.184/

Most FCN treaties give U.S. persons both national treatment and most-favored-nation treatment cumulatively with respect to acquiring, owning, and possessing personal property of all kinds, both tangible and intangible.185/ However, a contracting party usually reserves the right to restrict U.S. persons from having ownership interests in enterprises engaging in certain sensitive activities enumerated elsewhere in the treaty. For instance, Germany reserves in its FCN treaty with the United States the right to restrict ownership by U.S. persons of materials dangerous from the standpoint of public safety and activities which involve "communication, air, or water transportation, taking and administering trusts, banking involving depository functions, or the exploitation of land or other natural resources."186/

Since many investments in foreign real estate are structured through corporate vehicles, the provisions for rights of companies in FCN treaties have much significance.

FCN treaties did not even mention companies as artificial or distinguished from natural persons until 1911. Only since the mid-1940s have FCN treaties dealt with companies systematically and comprehensively to an extent comparable with the treatment given to natural persons. Initially, rights of a company were much more limited than those of a natural person.187/

In 1911, the treaty with Japan set forth provisions which were new to U.S. commercial treaties. It provided:

> Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of

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183/ Wilson, supra note 158, at 141.

184/ U.S.-Germany, Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593.

185/ Id. Art. IX, para. 1.

186/ Id. Arts. IX(2) and VII(2).

187/ Wilson, supra note 158, at 184-87.

either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.

> The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof.188/

Precedents for these provisions can be found in special agreements with Greece in 1890 and with Russia in 1904. The provisions set forth above in the Japan treaty were followed in the treaty of 1920 with Siam.189/

Starting with the treaty of 1923 with Germany during the interwar period, 12 general commercial treaties were entered into, all of which had the following provision on companies.

> Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

> The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such party as expressed in its National, State, or Provincial laws.190/

These provisions set forth additional tests for recognition, compared with those set forth in the treaty with Japan. In addition to being

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188/ Art. VII, U.S.-Japan, Treaty of Friendship, Commerce, and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

189/ Wilson, *supra* note 158, at 188.

190/ Art. XII, U.S.-Germany, Treaty of Friendship, Commerce, and Consular Rights, signed Dec. 8, 1923, 44 Stat. 2132.

organized under the laws of the United States, a U.S. company, to be recognized in Germany, must maintain a central office in the state in which it has been organized. Additionally, a company must not pursue objectives in the host state in violation of the laws of the latter. Most importantly, the reservation in the Japanese treaty is retained: the right of U.S. companies to engage in activities within Germany is not equal to the right of German nationals, but rather depends on German Federal and State laws.

Starting with the China treaty in 1946, the U.S. policy has been to obtain for U.S. companies and to give reciprocally to companies of other states the same rights according to the same standards as those provided to individuals.[191/]

In post-1946 treaties, a company is defined broadly as any corporation, partnership, company or other association which has been duly formed under the laws of the contracting parties.[192/] Hence, any "artificial" person created in one of the States in the United States qualifies, regardless of whether it is organized for profit. This definition is simpler than that set forth in the period of 1923-38, as represented by the provisions mentioned above in the treaty with Japan. The latter also required a central office and/or control to be in the U.S.[193/] Such requirements were consistent with the laws governing nationality of companies in civil law jurisdictions,[194/] and with recommendations of international law conventions.[195/]

Post-1946 U.S. FCN treaties provide for the terms and conditions under which U.S. companies have the rights to sue and be sued. The applicable standard has four elements:

1. National treatment is provided as a basic standard. U.S. companies, therefore, have access to the courts of the other party on terms no less favorable than those applicable to companies of the other contracting party. No provision limits the exercise of rights to qualifications of local law.

2. The most recent treaties have a protocol provision stating that the nondiscrimination rule applies to security for court costs.

191/ Wilson, _supra_ note 158, at 190-91.

192/ _See_, _e.g._, Art. XXV, para. 5 of the 1954 FCN treaty with Germany, _supra_ note 190.

193/ Walker, _Provisions on Companies in United States Commercial Treaties_, 50 Am. J. Int'l L. 373, 381.

194/ _See_, _e.g._, Kronstein, _The Nationality of International Enterprises_, 52 Cal. L. Rev. 983, 1001-1002 (1952); Wolff, Private International Law 297, 301 (1950).

195/ _See_, _e.g._, recommendations of the League of Nations Committee of Experts for the Progressive Codification of International Law, "Recognition of the Legal Personality of Foreign Commercial Corporations," and "Nationality of Commercial Corporations and their Diplomatic Protection," (Art. I of each Draft Convention) 22 Am. J. Int'l L. (1928) Spec. Supp. 202 and 166.

3. Access to courts embraces "administrative tribunals and agencies."

4. A company which has been admitted to do business and is in fact not engaged in activities within the jurisdiction, but which may still litigate there, is exempt from domestic and registration requirements.

Since 1946, FCN treaties have provided "national treatment" not only for national persons, but also for companies. Hence, U.S. companies are guaranteed equality of treatment with companies of the other party, with regard to engaging in all ordinary business activities--commercial, industrial, and financial. The principle applies to both the initial establishment of an enterprise and to the terms and conditions under which the company will receive most-favored-nation treatment. To the degree that national treatment is not provided, and in any event, a U.S. company is guaranteed most-favored-nation treatment.196/

The post-1946 FCN treaties give U.S. persons the right to organize and participate in companies organized in the other contracting state. In these treaties, U.S. persons have a right to establish a domestic subsidiary, or to acquire a subsidiary by purchasing a controlling interest in an existing domestic company. The standard applicable to the right to organize a domestic company is in principle national treatment. However, the most recent treaties contain qualifications that either party can prescribe special formalities in connection with the establishment of alien-controlled enterprises within its territories. However, such formalities are not to impair the substance of other rights.197/ The post-1946 FCN treaties also provide that a U.S.-controlled company doing business in a foreign contracting state has a right itself to national treatment. Discrimination against it in any way by reason of its domination by alien interests is not allowed.

Since 1945, most FCN treaties entered into by the United States have contained a provision to protect against persons from a third country or countries utilizing the treaty. This is done by measures enabling a contracting party to "pierce the corporate veil." Each contracting state reserves the right to impose measures denying the advantages of the FCN treaty to any company in the ownership or direction of which nationals of a third country or countries have directly or indirectly the controlling interest. In the most recent FCN treaties of the United States, two circumstances are set forth in which a party is required to "pierce the corporate veil." Both concern the protection of acquired property and attempt to ensure that the investments of the ultimate party in interest, which may be behind the corporate facade, are protected. For instance, a protocol to many of the recent FCN treaties states that:

> the provisions...for the payment of compensation shall extend to interests held directly or indirectly by

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196/ Wilson, _supra_ note 158, at 197-98.

197/ _See_, _e.g._, Art. VII of the U.S.-Japan Treaty of Friendship, Commerce, and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

> nationals and companies of either Party in property which is taken within the territories of the other Party.[198]

Hence, for example, if a U.S. person (natural or artificial) invests through a Netherlands subsidiary in a business venture in Japan for which it purchases real estate, and the real estate is nationalized, the U.S. company should have a claim for compensation.

FCN treaties of the United States set forth provisions relating to the protection of private property. The pre-1923 commercial treaties of the United States did not contain specific references to expropriation of property and the right to compensation therefor, or to both. Instead, FCN treaties contained broad provisions, which were intended to be applied according to a rule of reason.[199] However, a few of the pre-1923 FCN treaties do provide specifically for expropriation or compensation therefor. For instance, the 1850 treaty with Switzerland provides as follows:

> In the case of...expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed upon an equal footing with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained.[200]

Beginning in 1923, FCN treaties provided more specifically for the extent of protection in the event property is expropriated. The following provisions were used:

> The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.[201]

Although the pre-1923 treaties impliedly applied to artificial persons, the German treaty was the first treaty to start including more specific references to companies in connection with some treaty rights and privileges.

198/ *Id.* Protocol, para. 2.

199/ Wilson, *supra* note 158, at 112.

200/ Art. II, para. 3, 18(2), U.S.-Switzerland, Treaty of Friendship, Commerce, and Extradition, Nov. 25, 1850, 11 Stat. 587, T.S. No. 353.

201/ This provision is in many U.S. FCN treaties, including, for example: U.S.-Norway, Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, 47 Stat. 2135, T.S. 852; U.S.-Liberia, Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, 54 Stat. 1739, T.S. 956.

The first several commercial treaties which the United States concluded after World War II depart substantially from earlier language on property protection. Subsequent FCN treaties contain fairly "standard" provisions on this subject. Almost all post-World War II treaties which the United States concluded provide for the "most constant protection and security" for property. An exception is the treaty with Muscat, which refers to "all possible protection and security." Only four FCN treaties refer specifically to international law in connection with the degree of protection to be accorded to the property of U.S. persons. Some of the most recent FCN treaties provide for "equitable" treatment of property, and in some treaties this rule applies to aliens' property generally. Also, a recent trend is to insert in FCN treaties a clause that property protected includes that held indirectly as well as directly.[202/]

Most FCN treaties in the post-World War II period have provided for national and most-favored-nation treatment in connection with the selection of enterprises for nationalization. In addition, they have contained a rule, subject to express exceptions, for treatment of certain types of foreign private enterprises that shall be as favorable, with respect to rights and privileges of an economic nature, as that accorded local public enterprises competing with them.[203/]

Several very significant elements have been included in commercial treaties on property protection. Companies have been included as beneficiaries under the FCN treaties. Provisions guarantee U.S. persons a right to repatriate the compensation obtained. FCN treaties have provided that "just" compensation, and, in some cases, "just" and "effective" compensation must be paid for U.S. investors is the guarantee, in connection with the protection of property, of national and most-favored-nation treatment, but without allowing either of these to impose a limitation upon commitments made in more specific language and not on a contingent basis.[204/]

Most of the commercial treaties concluded by the United States have provided for civil judicial remedies, with one out of every two containing broadly stated rights and privileges for free access to the courts of justice. Since judicial remedies affect only ownership and holding of real estate abroad by U.S. persons to an ancillary extent, this discussion concerns only FCN treaties since 1923.

The treaties of the interwar period, which have a substantially "standard" form, contain provisions concerning general access to courts, judicial rights of corporations, and judicial benefits for aliens in connection with civil liability provisions of workmen's compensation laws. The German treaty of 1923 serves as a model for treaties of the period, and includes the following provisions:

> The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other

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202/ Wilson, *supra* note 158, at 116-22.
203/ *Id.*
204/ *Id.*

on conforming to the local laws, as well as for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.205/

Article XII of the German treaty has a rule applicable to companies. Article II of the treaty has the following provisions:

> With respect to that form of protection granted by National, State, or Provincial laws establishing civil liability for injuries or for death, and giving to relatives or heirs or dependents of an injured party a right of action or a pecuniary benefit, such relatives or heirs or dependents of the injured party, himself a national of either of the High Contracting Parties and within any of the territories of the other, shall regardless of where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.206/

Since World War II, each of the FCN treaties have provided for access to courts on a national treatment basis.

FCN treaties contain broad provisions on internal taxation. In most treaties, each contracting state agrees to give national treatment to the other party's nationals and companies in the matters of internal taxes, fees, and charges. In addition, FCN treaties often provide, with some exceptions, for most-favored-nation treatment in internal taxation. The internal taxation usually specified in FCN treaties includes "income, capital, transactions, activities, or any other object." Some of the more recently concluded FCN treaties distinguish between: (1) nationals of one party residing in the other's territory and engaged in gainful or other described activity; (2) nationals not resident in the other's territory and companies of one party not engaged in trade or business in the other's territory; and (3) nationals and companies of the parties in general. FCN treaties usually accord national treatment to the first category. They agree to give "in general" the same standard of treatment for the second category as that accorded to the first. They provide for most-favored-nation treatment for the third category.207/ The most-favored-nation treatment provisions are conditional insofar as they apply to personal taxation. Two standard exceptions are: (1) that for reciprocity arrangements; and (2) that for advantages accorded pursuant to double taxation conventions.208/

Many of the post-World War II FCN treaties set forth provisions on the taxation of real and personal property. For example, FCN treaties often provide that heirs, legatees, or donees in the other party's territory

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205/ U.S.-Germany, Treaty of Friendship, Commerce, and Consular Rights, signed Dec. 8, 1923, 44 Stat. 2132.

206/ Id.

207/ Wilson, supra note 158, at 172-73.

208/ Id. at 173.

shall be exempt from any restrictions, taxes, or charges other or higher than those which nationals would be subject. Other treaties are broader and not limited to taxes or charges. Taken as a whole, the FCN provisions concerning internal taxation of real and personal property mean that insofar as they can lawfully acquire property, and in their disposal of property, treaty aliens have in tax matters the protection of certain standards.[209/]

Summary of FCN Treaties

In summary, FCN treaties provide substantial protection to U.S. persons investing in foreign real estate. Although these treaties can be classified for discussion purposes according to the era in which they were negotiated and according to subject matter, each one must be read carefully and in its entirety before an effective analysis can be made of the protections afforded to U.S. persons. In addition, issues of constitutional law may arise as to the effect on the FCN treaty rights of legislation or administrative regulations inconsistent with and enacted subsequent to FCN treaties. Foreign states have different laws and theories concerning the relationship between public international and municipal law.

The U.S. Investment Guaranty Program

A principal means for a U.S. investor in foreign real estate to minimize the potential loss which may result from expropriation is to obtain insurance from the Overseas Private Investment Corporation (OPIC). OPIC is an agency of the U.S. Government which provides insurance to U.S. investors against the political risks of expropriation, currency inconvertibility, and war, revolution, or insurrection.[210/] The program is chartered under the Foreign Assistance Act of 1969.[211/] The U.S. investment guaranty program was previously operated by the U.S. Department of State's Agency for International Development (AID) since the early 1950's. OPIC, besides insuring investments, has helped in several instances to finance privately negotiated sales of foreign-owned property to host governments in lieu of expropriation.[212/]

The legislation establishing the investment guaranty program provides that consideration shall be given to those countries which demonstrate "their willingness and ability to maintain conditions which enable private enterprise to make its full contribution to the development

209/ Wilson, supra note 158, at 175-76.

210/ 22 U.S.C. sec. 2194 (1970).

211/ Id. secs. 2191-2200a.

212/ Mays, Overseas Private Investment Corporation and Investment in the Americas, 7 Int'l Lwyr. 132, 135-37 (1973); Brower, The Future of Foreign Investment--Recent Developments in the International Law of Expropriation and Compensation 93, 161 in Symposium: Private Investors Abroad (The Southwestern Legal Foundat., Dallas, Tex., 1975).

process."[213] The Act also discourages monopolistic practices and has the objective of furthering the balance of payments objectives of the U.S.[214] In addition, the Act calls for the conducting of operations with due regard to principles of risk management.[215]

According to its charter, OPIC must determine, prior to issuing insurance or guarantees for an investment in a particular country, that proper arrangements have been made with that country whereby the agency can be subrogated to any claim on account of which it makes payment.[216] In this connection, OPIC will only insure or guarantee an investment in a country which has concluded with the United States an agreement regarding investment guarantees.[217] Ordinarily, these agreements set forth that: (1) investment guarantees will be given only for investments which have been approved by the host government; (2) if the United States pays pursuant to a guaranty, the host government will recognize the succession of the United States to any currency, assets, or claims which have accrued from making the payment; (3) any claim arising out of the guaranteed investment which, in the opinion of the government asserting it, poses an issue of public international law, shall be submitted to negotiation; (4) if, after a reasonable time, the two governments cannot settle the claim by mutual agreement, the claim must be submitted for settlement to an arbitral tribunal chosen in the manner set forth in the agreement; and (5) the decision of the arbitral tribunal must be based exclusively on the applicable principles and rules of international law.[218]

OPIC is a semiindependent branch of the U.S. Government, and the latter owns all its capital stock.[219] The President, with the advice and consent of the Senate, appoints its chief executive officers and 6 of its 11 directors. The remaining directors are government officials. One of the nonofficial directors must be experienced in small business, one in organized labor, and one in cooperatives.[220] OPIC has made arrangements with Lloyd's of London and an American insurance group to share some of its risk portfolio, and it is contemplated OPIC will no longer manage expropriation risks after December 31, 1979.

Certain requirements and limitations are imposed by the legislation. The insured must be an "eligible investor," either a U.S. citizen, a corporation created under American law and substantially beneficially owned by citizens, or a foreign corporation wholly owned by citizens.[221] Guarantees cannot exceed 2 years in duration or cover more than the original investment plus interest or profits thereon.[222]

213/ 22 U.S.C sec. 2191(f) (1970).
214/ *Id.* secs. 2191(g) and (h).
215/ *Id.* sec. 2191(d).
216/ *Id.* sec. 2197(b).
217/ Brower, *supra* note 212, at 162.
218/ *Id.*
219/ 22 U.S.C. sec. 2192 (1970).
220/ *Id.* sec. 2193.
221/ *Id.* sec. 2198(c).
222/ *Id.* secs. 2197(e) and (f).

Under the legislation, an investment embraces any contribution of funds, commodities, services, patents, processes, or techniques in the form of (1) loans to a project; (2) the purchase of shares in a project; (3) participation in royalties, earnings, or profits of a project; and (4) the supplying of commodities or services under a lease or other contract.223/ Expropriation under the legislation includes abrogation, repudiation, or impairment by a foreign government of its own contract with an investor, if such abrogation, repudiation, or impairment is not caused by the investor's own fault or misconduct, and substantially adversely affects the continued operation of the project.

There are several types of investment by U.S. persons in foreign real estate to which the Act may apply. The Act applies to agreements between a U.S. corporation and a housing authority to build apartments. The Act may apply to U.S. corporations which enter into concession agreements to extract natural resources, such as energy minerals (oil, gas, coal), iron ore, timber, etc. In other cases, a U.S. company may enter into an agreement to own, construct, and operate a hotel and other tourist facilities, and can receive protection under the Act. Hence, the Act covers a broad spectrum of investments by U.S. persons in income-producing real estate.

Double-Taxation Conventions

Double taxation conventions constitute a princpal method by which U.S. persons investing in real estate abroad may secure relief from the possibility of being taxed twice.

Although there are general principles of treaty relief, in dealing with any particular case, one must examine the specific treaty involved. The tax consequences, as set forth in a particular bilateral treaty, will be determined by how the income is characterized in the treaty. Some of the countries with which the United States has concluded treaties are OECD224/ members who have adopted some uniform principles for treating various taxable categories.225/

In applying a bilateral tax treaty to a particular real estate investment, one must know in which of the following categories an investor's income from real property may be classified: (1) income from immovable property; (2) income in the form of dividends from a U.S. corporation engaged wholly or partly in investments in U.S. real estate; (3) income from earnings and dividends from a foreign entity engaged wholly or partly in foreign real estate investments; (4) gains from the sale of

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223/ *Id.* sec. 2198(a).

224/ Organization for Economic Cooperation and Development. The members of OECD are: Austria, Belgium, Canada, Denmark, England, France, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States.

225/ *See* OECD, Draft Double Taxation Convention (1977).

capital assets such as stock; or (5) income from debts, mortgages, and loans which finance real estate investments abroad.

Since several essays have been written elsewhere on the subject of double-tax conventions and their impact on transnational real estate investments, this report does not discuss the subject further, but refers the interested reader to them.226/ Although these essays concentrate on applying tax conventions to investments by foreigners in U.S. real estate, a U.S. person investing in foreign real estate will consider the same issues. Then the tax treaty will be applied in the context of the laws of the jurisdiction in which the investment occurs as well as in the context of applicable U.S. tax laws.

Summary of Section on Bilateral Treaties

The bilateral treaties discussed in this section may affect immensely the advantages or disadvantages of an investment by a U.S. person in foreign real estate. Depending on the type of investment involved, the existence and use of bilateral treaties may be crucial in the decision to invest or in the planning and structuring of such an investment.

Multilateral Treaties

Multilateral treaties are sources of public international law which apply to more than two states. The application of multilateral treaties to transnational real estate investments can provide significant protections for U.S. persons investing in real estate abroad. Three multilateral treaties are examined in this report: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; the United Nations Convention on Foreign Arbitral Awards; and the OECD Code of Liberalization of Capital Movements and Declaration of International Investment and Multinational Enterprise.

Convention on the Settlement of Investment Disputes

An important mechanism to help U.S. investors settle disputes arising from investments abroad has been the widespread signing and use of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. The Convention was drawn up in 1965 by the International Bank for Reconstruction and Development (IBRD). The IBRD's desire to facilitate the international flow of private capital for economic development led to its participation in the arbitration or mediation of disputes, and finally to draft the Convention.

226/ See, e.g., Abrutyn, U.S. Real Estate and the Foreign Investor, The International Tax Report (April 1 and 29, 1975); Forry, Planning Investments from Abroad in United States Real Estate, 9 Int'l Lawy. 239 (1975); Zagaris, Investment by Nonresident Aliens in United States Real Estate, 31 U. of Miami L. Rev. 566 (1977).

The Convention became effective in 1966 after it received the necessary amount of ratifications. As of April 1, 1975, 71 states had signed the Convention, and 66 states had ratified it.

The Convention constitutes an important innovation for both the law of international claims and the law of peaceful settlement of international disputes since it establishes facilities for settlement of investment disputes through conciliation or arbitration to which the host country and the foreign investors can be parties to on an equal procedural basis without requiring or allowing the intervention of the investor's national State.[227/]

The jurisdiction of the Center is restricted to legal disputes between a contracting state or any of its constituent subdivisions or agencies designated to the Center by that state and a person having the nationality of another contracting state. Hence, disputes between two contracting states, or between the contracting state and an international organization or between a contracting state and the nationals are excluded. Therefore, only legal disputes arising between a foreign investor and the host state, directly out of an investment, are included in the jurisdiction of the Convention.

Proceedings can be started under the Convention by any contracting state or by a national of a contracting state filing a request showing the nature of the dispute and that jurisdictional requirements have been fulfilled. Both parties must consent in order for the arbitral tribunal to have jurisdiction. Mere ratification of the Convention by a contracting state does not by itself give consent to arbitration under it. However, a contracting state may give consent in advance--in legislation, in a separate agreement between contracting states, or in an agreement between a contracting state and a national of another contracting state that might, for example, be included in a concession agreement.

The composition of the arbitral tribunal consists of members who are selected from a panel of arbitrators designated primarily by the contracting states. Unless the disputants provide otherwise, the arbitration takes place according to the rules relating to procedures, finality of an award, or interpretation or revision of an award as are set forth in the Convention.

Two examples of investment by U.S. persons in foreign real estate activities which have commenced arbitration under sponsorship of the Center are that of the Holiday Inns against Morocco and that of Alcoa, Kaiser, and Reynolds aluminum firms against Jamaica.

The U.S. Congress, pursuant to Article 69 of the Convention, has passed legislation to carry out the obligations of the United States under it.[228/] Under the Act, it is provided that the award of an arbitral

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227/ *See* Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Rec. des Cours de L'Academie de Droit Int'l 337 (1972). Also see Steiner & Vagts, *supra* note 148, at 484-86.

228/ 80 Stat. 344 (1966), 22 U.S.C. secs. 1650, 1650a (1970).

tribunal under the Convention creates a right arising under a treaty of the United States and that the financial obligations resulting from such an award are to be accorded the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Act also confers on the Federal district courts jurisdiction of one of the several states. The Act also confers on the Federal district courts jurisdiction over such proceedings.

The Convention on the Settlement of Investment Disputes represents a recently established vehicle whereby public international law provides foreign investors (e.g., U.S. persons investing abroad) and countries improved procedures by which they can settle disputes.

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

With the ratification by the United States of the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, the treatment of international arbitration resulting from investments by U.S. persons in foreign real estate will be largely determined by this multilateral Convention. At least 41 other countries have become parties to the Convention.

The Convention requires signatory countries (1) to recognize an agreement to arbitrate unless the agreement is found to be void, and (2) to recognize awards under such agreements and enforce them by proceedings not substantially more burdensome than those applicable to domestic awards. The Convention allows the parties to determine the composition of arbitral authority and the procedure to be used, so that the parties can adopt their own rules if they are unable to agree on the rules of the International Chamber of Commerce, the American Arbitration Association, or similar bodies.229/

Several exceptions in the Convention permit a country to not recognize or enforce foreign arbitral awards: (a) incapacity or invalidity "of the contract under the law to which the parties have subjected it"; (b) failure to provide notice to a party of the proceedings so as to deprive him of the ability to defend; (c) entering an award outside the scope of the agreement; and (d) nonconformity of the proceedings with the agreement. In addition, nonarbitrability of the subject matter and public policy also constitute exceptions.

Chapter 2 of the U.S. Arbitration Act was enacted by Congress to implement the Convention. Section 201 of the Act provides in general for the enforcement of the Convention. Section 202 restricts the Act's applicability to awards arising out of "commercial relationships" and, in the case of dealings between citizens of the United States, to those arising

229/ See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049 (1961).

out of a relationship that "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[230] Section 203 gives jurisdiction over Convention cases to Federal courts without regard to the independent basis for Federal jurisdiction. It should also be noted that the Convention supersedes provisions about arbitration clauses in treaties of FCN.[231]

OECD Standards

The Organization of Economic Cooperation and Development (OECD), established in 1961[232] as an expanded successor to the Organization of European Economic Cooperation, consists of 24 member countries,[233] and two others with a special status.[234] The goals of OECD are to promote growth, full employment, and trade "on a multilateral, nondiscriminatory basis," and financial stability.

All member states have a seat on the OECD council, and annually elect 12 members to the executive committee, which is convened weekly. The executive committee chooses a president and two vice-presidents annually. The council nominates the secretary-general for a 5-year term. Permanent committees have been established for economic policy, trade, development assistance, and monetary and foreign exchange matters. Several *ad hoc* committees also have been established. An OECD member is bound by a decision or recommendation,[235] except when it has not voted for it,[236] as soon as it has fulfilled the requirements of its own constitutional procedures.[237]

The OECD has adopted a Code of Liberalization of Capital Movements. Under the Code, member countries agree to progressively eliminate restrictions on capital movements and try to refrain from introducing new restrictions on capital movements or make existing regulations more restrictive. All transactions and transfers set forth in the measures of liberalization are contained in an annex to the Code, and must be authorized. However, member countries can make reservations to these measures. The Committee for Invisible Transactions examines these reservations at least once every 18 months to help member countries withdraw their reservations.[238]

230/ Steiner & Vagts, *supra* note 148, at 833. (Emphasis added.)
231/ *Id.*
232/ Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891; for background information on OECD, see Ohlin, *The Organization for Economic Cooperation and Development*, 22 Int'l Org. 231 (1968).
233/ *See* note 224, *supra*.
234/ New Zealand and Yugoslavia.
235/ OECD Convention, *supra* note 232, at Art. 5(a).
236/ *Id.* Art. 6.2.
237/ *Id.* Art. 6.3.
238/ Letter to Richard Nolan, Chairman, Subcommittee on Family Farms, Rural Development, and Special Studies, House of Repres., from Douglas J. Bennet, Jr., Asst. Secty. for Congressional Relations (July 12, 1978).

Two lists are set forth. In table 1 is a list of OECD members which have made reservations on nonresident building or purchase operations in real estate. Twelve members have made reservations. In addition, Canada does not adhere to the Code, and liberalization measures do not apply to Greece, Iceland, and Turkey. Therefore, only 8 of the 24 members adhere to the Code of Liberalization of Capital Movements concerning nonresident operations in real estate. The number is small, especially since OECD members are considered to be representatives of the capitalist system and favorable to transnational investments.

In the OECD Declaration on International Investment and Multinational Enterprises,[239] OECD members are to accord to foreign-controlled enterprises operating in their territory treatment under their laws, regulations, and administrative practices, consistent with international law and no less favorable than that accorded in like situations to domestic enterprises.

The OECD Declaration has an annex which provides guidelines for multinational enterprises. The guidelines are designed to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve difficulties which their various operations may produce.[240] Observance of the guidelines is voluntary and not legally enforceable. OECD members have agreed to establish review and consultation procedures concerning issues arising in respect to the guidelines.

A "Decison of the OECD Council on National Treatment"[241] requires that measures taken by an OECD member which are exceptions to national treatment--including new measures restricting new investment of foreign-controlled enterprises already established in their country, and which are in effect on the date of the Decision--must be made known to the Organization. In connection with this Decision, in table 2 is a list of those countries which have filed exceptions to national treatment in the purchase of real estate. The list includes restrictions on nonresident land purchases in member countries not adhering or to whom the liberalization provisions of the Code do not apply. The Decision also requires that measures taken by an OECD member or one of its territorial subdivisions which are new exceptions to national treatment--including measures restricting investment by foreign-controlled enterprises--must be made known to OECD within 30 days of the date of their effectiveness, together with the specific reasons therefor and the duration thereof.[242]

According to the Decision, the Committee on International Investment and Multinational Enterprises must meet periodically to consider how national treatment and the exceptions are being implemented to try to extend the application of national treatment. In this connection, the Committee is to make proposals and is to serve as a forum for consultations at the

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239/ 15 Int'l Leg. Mat. 967.
240/ Id. at 977.
241/ Id. at 978.
242/ Id. at 979.

Table 1--OECD countries with reservations on code of liberalization of capital movements concerning nonresident operations in real estate, particularly building or purchase

Country	Remarks
Austria	
Belgium	
Denmark	Reservation does not apply to persons formerly residents of Denmark for more than 5 years.
Finland	
Japan	
Luxembourg	
New Zealand	Reservation applies only to purchase of rural farmland, scenic reserve land, and offshore islands.
Norway	
Portugal	
Spain	Reservation applies only to the purchase of rural property exceeding 4 hectares of irrigable land or 20 hectares of nonirrigable land.
Sweden	Reservation applies only to the extent there are limits on nonresident rights to acquire certain types of real estate.
Switzerland	

Note: OECD member countries are: Austria, Belgium, Canada, Denmark, Finland, France, Greece, Iceland, Ireland, the Federal Republic of Germany, Italy, Japan, Norway, Luxembourg, the Netherlands, New Zealand, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Canada does not adhere to the Code and liberalization measures do not apply to Greece, Iceland, and Turkey.

Table 2--OECD countries with reservations on code of liberalization of capital movements concerning resident operations in foreign real estate, particularly building or purchase

Country	Remarks
Australia	
Austria	Reservation applies only to real estate not intended for the personal use of the buyer within 1 year.
Belgium	
Denmark	Reservation does not apply to real estate whose value does not exceed: (a) Danish Kroner 150,000 in cases approved on health grounds; and (b) Danish Kroner 60,000 in all other cases.
Finland	
France	Reservation applies only to purchases of real estate exceeding French Francs 300,000 per household.
Ireland	Reservation does not apply to: (a) development projects by experienced property management companies; or (b) purchase of single houses or apartments by individuals.
Italy	
Japan	Reservation does not apply to the acquisition of real estate for residential or other nonprofit-making purposes, or for use as administrative offices.
Luxembourg	
New Zealand	
Norway	Reservation does not apply to real estate whose value does not exceed Norwegian Kroner 80,000.
Portugal	
Spain	
Sweden	Reservation does not apply to real estate for recreation purposes whose value does not exceed Swedish Kroner 40,000. The limit is increased to Swedish Kroner 75,000 in cases where applicant has reached age of 60 or the application is supported by a medical certification.
United Kingdom	Reservation does not apply to: (a) development projects by experienced property management companies; or (b) purchase of single houses or apartments by individuals.

request of an OECD member concerning any matter relating to the Decision on National Treatment, such as exceptions. The Decision is to be reviewed within 3 years.243/

Summary of Multilateral Treaty Section

The three multilateral treaties discussed in this section provide protection for U.S. persons investing in foreign real estate. Other multilateral treaties also may be useful. The figure in the appendix illustrates the countries in which the three treaties are in force.

ADDITIONAL MATTERS CONCERNING RESTRICTIONS AND PROTECTIONS

This section considers three topics: (1) The rationale for the classification selected for discussion of the restrictions and protections is set forth. (2) An initial selection of countries for detailed study in the second part of the report is presented. (3) Finally, a review is made of the literature pertaining to the domestic and public international law elements concerning the restrictions and protections discussed in this report.

Rationale for the Classification System Adopted

The classification system adopted for describing the laws relating to investment by U.S. persons in foreign real estate was selected because the categories of the classification system facilitate discussion of the laws pertinent to the transactions in question for the wide variety of countries selected. The diversity of countries covered requires that each category be only highlighted. A major limitation in devising a classification system is that no country has enacted uniform laws. Therefore, in many cases, the subject matter of one country's legislative category can be understood only by considering its interaction with the subject matter of another category.

The classification system was chosen also for its ability to be depicted in a figure, which is in the appendix.

Another reason for the classification system chosen is that for the first part of the report a topical survey of substantive matter can best complement the second part of the report, since the latter looks more closely at the laws of some of the countries mentioned in the first section. In addition, since the second part of the report focuses on a broader spectrum of subject-matter categories for a smaller number of countries, the approach of highlighting a smaller number of categories for a larger number of countries is a useful means of introducing the information.

243/ *Id.*

An Initial Selection of Countries for Detailed Study

The countries selected for detailed study are: Belgium, Brazil, Canada, the Federal Republic of Germany, France, Japan, Mexico, the Netherlands, Saudi Arabia, Switzerland, and the United Kingdom.

Some of the countries were chosen because they are the sources for much investment in the United States. This applies to Belgium, Canada, the Federal Republic of Germany, France, Japan, the Netherlands, Switzerland, and the United Kingdom. Since countries from which investment in the United States comes may respond to measures taken by the U.S. Government toward investment originating from their own countries, it is of interest to ascertain the current laws vis-a-vis investment in real estate in these countries by U.S. persons.

A significant reason for selecting the eight countries listed above is that their institutions and approaches may provide useful insights and examples for U.S. policymakers. These eight countries have similarities to the United States in their socioeconomic and political systems. In addition, much transnational investment between the United States and them already exists. The consideration of how other legal systems have approached problems has previously been significant in assisting U.S. policymakers and legislators. For example, although the United States has a highly developed legal culture, the sponsors of the Uniform Commercial Code in the 1950's were influenced substantially by the study of the German commercial code.[244/] In many cases, foreign elements borrowed must be modified to accommodate the differences in the U.S. legal and institutional system. In other cases, even though a legal approach by another country to a similar problem may not be applicable, it may nevertheless provide new perspectives for policymakers.

Brazil and Mexico were selected for detailed study because they have detailed laws vis-a-vis foreign investment in real estate, which is in itself of significant interest. Brazil and Mexico also provide geographic and economic diversity to the profile of countries selected for detailed study. Saudi Arabia was selected to give geographic and ideologic diversity, and to investigate how an Arab country treats U.S. investments in real estate in their territory.

The second part of the report considers the restrictions and protections concerning investment by U.S. persons in foreign real estate as they are applied in the countries selected and mentioned above. The types of restrictions and protections investigated have been set forth already.

244/ See, e.g., Schlesinger, The Uniform Commercial Code in the Light of Comparative Law, 1 Inter-Amer. L.Rev. 11-58 (1959); also see Schlesinger, Comparative Law 14-24 (1975).

A Review of the Literature Pertaining to the First Part of the Report

This review of the literature pertaining to the first part of the report notes the salient sources used to write the report and lists a bibliography of some of the sources consulted.

Domestic Law

With respect to the domestic or municipal laws and regulations of the countries selected, a few secondary sources were relied upon heavily. They are: Martindale-Hubbell Law Directory, Volume VII (Uniform Law Digest); the U.S. Department of Commerce Overseas Business Reports; the multivolume Investment Laws of the World by the International Center for the Settlement of Investment Disputes; and the Organization of American States A Comparative Study of Latin American Legislation on the Regulation and Control of Private Foreign Investment. Two works published by the U.S. Department of Commerce--Survey of Incentives and Performance Requirements for Foreign Direct Investments in Member Countries and Incentives and Performance Requirements for Foreign Direct Investments in Selected Countries--contain current information concerning performance requirements and other aspects of incentive legislation for direct investment in selected countries. These sources were supplemented by law review articles, books, and other sources, as noted in the footnotes and bibliography.

It should be emphasized that the number of countries selected, the amount of subject matter, and the time limitations did not permit the consultation in all cases of primary sources. If an attorney or legal scholar seeks a precise opinion on a narrow point of law, he or she will, after consulting secondary sources, study the primary sources (e.g., statutes, administrative regulations, constitution, case law). Finally, an attorney qualified to practice law in the jurisdiction concerned and competent in the particular legal field at issue will then review the work of the foreign attorney or legal scholar.[245]

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245/ See, e.g., Schlesinger, How to Begin Research on Comparative and Foreign Law, in Comparative Law 637-39 (1975).

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Public International Law

The section on bilateral treaties selected for discussion concerns the U.S. Treaties of Friendship, Commerce, and Navigation. The best sources are the treaties themselves. The book by R.R. Wilson, entitled U.S. Commercial Treaties and International Law, is the single most useful secondary source on FCN treaties. The law journal articles of Walker and Wilson also were helpful. The Whiteman Digest of International Law provides background on older FCN treaty policy.

Concerning investment guarantees, the U.S. legislation and treaties are the best sources, with the law journal articles and pamphlets of OPIC providing helpful secondary sources.

Double taxation conventions and their application to transnational investments in real estate have been widely discussed in law journals and books. The law journal articles cited provide a starting point.

The text of the multilateral treaties can be best understood if they are read in conjunction with the history of their negotiation and implementation. The book entitled Transnational Legal Problems by H. Steiner and H. Vagts introduces both the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States and the United Nations Convention on Foreign Arbitral Awards. In addition, the Steiner and Vagts book has bibliographies on these conventions. The OECD material can be obtained from the OECD directly or in International Legal Materials, published by the American Society of International Law. The symposia of the Southwestern Legal Foundation, entitled Symposium Private Investors Abroad, contains useful material on the interaction of U.S. laws with various types of public international law sources.

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Appendix--restrictions and protections

This figure is only for purposes of illustrating the material contained in this report. It is based primarily on secondary material which has not been verified. Blank spaces indicate that insufficient evidence has been located to form a judgment on the category.

An "x" indicates that the type of 15 restrictions or treaties described in the heading and discussed in the text exist in the respective countries. An "o" indicates that the type of restriction or treaty does not exist.

Country	II--Total Prohibition for Investment in Real Estate	III--Restriction on Foreign Invest in Real Estate in Geogr Areas	IV--Restriction for Foreigners on Certain Int in Real Estate	V--Restriction on Certain Sectors or Busin Types	VI--Limits to Certain %	VII--Authorization Requirements
Argentina	o			x (e.g., agric, forestry)		
Australia	o	x (e.g., States & Territ)	x	x (e.g., agric)		
Austria	o		x	x	o	x
Belgium	o	o	o		x	x
Brazil	o	x (e.g., rural & where mili is interested)	x	x	x	x
Canada	o	x (e.g., provinc. variations)	o	x	o	x
Chile	o			x		
Denmark	o		x	x	o	x
Domin. Rep.	o	o		x	x	x

Country	II--Total Prohibition for Investment in Real Estate	III--Restriction on Foreign Invest in Real Estate in Geogr Areas	IV--Restriction for Foreigners on Certain Int in Real Estate	V--Restriction on Certain Sectors or Busin Types	VI--Limits to Certain %	VII--Authorization Requirements
Ecuador	o	x (border)		x		x
Egypt	o	o	o	o	o	x
F.R. Germany	o	x (e.g., States)	o		o	x
Finland	o	o	x	x	x	x
France	o	o	o	x		
Greece	o	x	o	o	o	x
Guyana	o	o	o	o	o	
Guinea	o	o	o	o	o	x
Indonesia	o	x	x	x	o	x
Iran	o		x	x		
Italy	o	o	o	o	o	o
Israel	o		o		o	
Jamaica	o	o	o	x	o	o
Japan	o	o	x	x	x	x
Jordan	o				o	x
Kenya	o	o		x	o	x

Country	II--Total Prohibition for Investment in Real Estate	III--Restriction on Foreign Invest in Real Estate in Geogr Areas	IV--Restriction for Foreigners on Certain Int in Real Estate	V--Restriction on Certain Sectors or Busin Types	VI--Limits to Certain %	VII--Authorization Requirements
Korea				x		x
Ireland	o		x	x		
Liberia	x	x	x	x	o	x
Mexico	o	x	x	x	x	x
Netherlands	o	o	o	o	o	o
New Zealand	o	x		x	x	x
Norway				x		
Paraguay	o	o	o	o		x
Peru	o	x	x	x	x	x
Philippines	o			x	x	x
Saudi Arabia	o	o	o	x	o	x
Soviet Union	x					
Spain	o			x	x	x
Switzerland	o	o	o	x		x
Uruguay	o			x		x
Venezuela				x	x	x
Yugoslavia			x	x	x	
United King.	o	o	o		o	o

Country	VIII-- Registration Requirements	IX-- Classif of For Investors	X-- Calvo Clause Required	XI-- Exception for Types of F.I.	XII-- Finance Restrict (Int. & External)	XIII-- Repatriat of Capit & Transf of Profits	XIV-- Bilateral Treaties FCN	Double Tax	XV-- Multilat Treaties SD*	A*	OECD
Argentina	x	x	x		x	x	x	o	o	o	o
Australia	x	x	o		x	x	x	x	o	x	x
Austria	x	x	x		x	x	x	x	x	x	x
Belgium	x		o			x	x	x	x	x	x
Brazil	x	x			x	x	o	o	o	x	o
Canada	x		o		x	o	x	x	o	o	x
Chile					x	x	o	o	o	x	o
Denmark	x		o		x	o	x	x	x	x	x
Domin. Rep.	x	x			x	x	o	o	o	o	o
Ecuador	x	x			x	o	x	o	o	x	o
Egypt	x	x	o	o	x	x	o	o	o	x	o
F.R. Germany	x	x	o		o	o	x	x	x	x	x

*SD=Conv settlmt to investmt disputes.

*A=UN Conv on recogn of for arbitral awards.

Country	VIII--Registration Requirements	IX--Classif of For Investors	X--Calvo Clause Required	XI--Exception for Types of F.I.	XII--Finance Restrict (Int. & External)	XIII--Repatriat of Capit & Transf of Profits	XIV--Bilateral Treaties FCN	Double Tax	XV--Multilat Treaties SD*	A*	OECD
Finland	x	x	o	x	x	x	x	x	x	x	x
France			o		x	x	x	x	x	x	x
Greece	x	o	o	o	o	x	x	x	x	x	x
Guyana	x	o		o	x	x	o	o	x	o	o
Guinea	x	o	o	o	o	o	o	o	x	o	o
Indonesia	x	x	o	o			o	o	o	o	o
Iran	x					x	x	o	o	o	o
Italy	o	o	o	o		x	x	x	x	x	x
Israel			o			x	x	o	o	x	o
Jamaica	o		o		x	x	o		x	o	o
Japan	x	x	o	o	x	x	x	x	x	x	x
Jordan	x		o		x	x	o	o	o	o	o
Kenya	x		o	o	x	x	o	o	x	o	o
Korea	x		o			x	x	o	x	o	o
Ireland	o		o				x	x			
Liberia	x	x	o	x		x	x	o	x	o	o

Country	VIII-- Registration Requirements	IX-- Classif of For Investors	X-- Calvo Clause Required	XI-- Exception for Types of F.I.	XII-- Finance Restrict (Int. & External)	XIII-- Repatriat of Capit & Transf of Profits	XIV-- Bilateral Treaties FCN	Double Tax	XV-- Multilat Treaties SD*	A*	OECD
Mexico	x	x	x		x		o	o	o	x	o
Netherlands	o		o		x	x	x	x	x	x	x
New Zealand	x	x	o		x	x	x	x	o	o	x
Norway	x		o		x	x	x	x	x	x	x
Paraguay	x				x	x	o	o	o	o	o
Peru	x	x			x	x	o	o	o	o	o
Philippines	x	x	o		x	x	o	o	o	x	o
Saudi Arabia	x	x	o				x	o	o	o	o
Soviet Union					x	x	o	o	o	x	o
Spain	x	x	o		x	x	x	o	o	x	x
Sweden	x		o		x	x	x	x	x	x	x
Switzerland	x	x	o			x	x	x	x	x	x
Uruguay	x				x	x	o	o	o	o	o
Venezuela	x	x			x	x	x	o	o	o	o
Yugoslavia	x		o			x	x	o	x	o	o
United King.	o	o	o			x	x	x	x	o	x

PART II

Introduction

This is the second part of a discussion of the laws which govern investment by U.S. persons in foreign real estate.

In the first part, the laws of more than 40 countries are surveyed. The report classifies laws governing investment by U.S. persons in foreign real estate into domestic laws and regulations and public international law restrictions and protections.

In this part of the report, the information contained in part one is developed. More detailed investigations of the laws and regulations as they pertain to 11 countries are described. Some of the categories are the same as those used in the first part.

A limitation of both parts of the report is that resource materials, the time period, and budget of the project impose substantial constraints. These limitations did not always permit ascertaining identical information on all elements of the legal systems. Therefore, the emphases of the respective systems addressed in the report vary.

Belgium

Introduction to its Legal System

Belgium has a legal system which is based on the code system, and its civil code is very similar to the French Napoleonic Code. Its small size and central location in Europe have resulted in the development of strong ties between Belgium and its neighbors Luxembourg and the Netherlands as well as with the European Economic Community for which Brussels is the headquarters.

Climate and Laws Governing Real Property

The real estate profession and its operation.--In Belgium, approximately 2,000 individuals and firms are registered as engaged in real estate work. The national organization, which has international recognition, is the Federation Nationale des Chambres Immobilieres de Belgique. It is a federation of organizations in each of the provinces, with a combined membership of 700.

Ordinarily firms engaged in real estate work conduct a general real estate agency business without emphasis on a particular specialty. However, some individuals do specialize in, *inter alia*, industrial and commercial property, construction, selling homes or apartments, leasing retail and office spaces, and servicing the international transfer of employees.

The seller pays the commission of a real estate agent, which usually is agreed upon in the contract or according to the schedule published by the organization. The commission is 5 percent of the total sales price or the total rent involved in a lease up to 500,000 Belgian francs, and 3 percent on the amount in excess thereof. Management fees are 10 percent of the rents collected, but are reduced to 7 percent by agreement. The commercial lease fee is 10 percent or 15 percent of the first year's rent.[1/]

Financing institutions and policies.--In Belgium, more than 80 commercial banks exist with over 2,100 branches. There are many savings banks which make medium- and long-term commercial as well as mortgage loans for terms up to 15 years. Specialized mortgage banks--Caisse Hypothecaires--make longer term loans, generally up to 25 years, including the financing of new construction projects. Insurance companies also are important sources of housing finance.

Since debt is abhorred by Belgians, a multiplicity of savings institutions exist in Belgium. A tendency exists to make relatively short-term loans and towards owning homes free and clear of indebtedness.[2/]

Ordinarily mortgages rather than deeds of trust are used to finance the purchase of real property. First mortgages on a private home often are not for more than 50 percent of value, except when made in conjunction with government guaranty or subsidy programs, or in marketing of new developments.[3/]

The law of immovable property.--In Belgium, the usual distinction made in code systems between immovable and movable property exists.

The sale and transfer of land and the land register.--After an agreement is reached to transfer title to property, the proposed agreement will be brought to a notary, who is a lawyer licensed by the national government. The notary will then put the agreement in proper formalities for signature of the parties and have it entered into the district register of land titles. Although an agreement to sell or lease is valid as to the contracting parties if it is not registered, it is valid as to third parties only when it is registered.[4/]

Mortgages.--Mortgages in Belgium are of three types: legal; by will; or by agreement. Mortgages must be created by a notarial instrument or by a private agreement recognized by a judgment. They must be recorded at

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1/ E. Cosner, Real Estate--European Style 66-68 (1976).
2/ Id. at 61.
3/ Id. at 71-72.
4/ Id at 70.

the office of the registrar of mortgages in the district where immovables are situated. They have priority according to the time at which they are recorded.5/

Family law and rights in real property.--Unless a matrimonial agreement to the contrary exists, community property governs property rights of spouses upon marriage. These rules provide that each spouse retains ownership of property owned at the time of marriage or acquired during marriage through inheritance or gift as well as certain personal property. Income from assets or professional activity of spouses and acquisitions made during marriage are considered community property. Community property rules cease upon the dissolution of the community.

Persons possessing property who marry in Belgium arrange their property rights by contract, which a notary draws. In entering into such an agreement, the spouses may not vary from the basic rules governing parental relationship to children and from rules of inheritance.6/

Descent and Distribution

Intestate and testate succession.--In Belgium, in the event a decedent leaves no descendants and no brothers and sisters or descendants of the same, the estate is divided equally between the ascendants of both the paternal and the maternal lines. The right to succeed in each line goes to the nearest in relationship who, to the exclusion of the more distant relations, inherits the part coming to his line. Ascendants in one line related in the same degree inherit *per capita*.

In the event an intestate decedent leaves a widow(er), the latter has a right to full ownership only in the absence of legitimate heirs entitled to inherit and of illegitimate children legally recognized. A widow(er), if excluded by her relatives from full ownership and who was neither separated nor divorced at the time, has a right to a life interest. This right cannot exceed one-fourth if there are children of a previous marriage. The right to income for life is calculated on the entire estate if the decedent leaves only collaterals who are neither brothers nor sisters or descendants. In all other cases, the life interest is in half of the estate.

Immovable property belonging to foreigners in Belgium is governed by Belgian law. Personal (movable) property is governed by the law of their last domicile. If foreigners and Belgian citizens inherit together and various parts of the estate are governed by different laws, the Belgian heirs can obtain compensation on goods situated in Belgium for any amount from which they have been excluded due to different conflict rules governing the distribution of goods situated outside Belgium.7/

5/ 7 *Martindale-Hubbell Law Directory* 3357 (1979).
6/ *Id.* at 3355.
7/ *Id.* at 3353.

The reserve rule applies in Belgium and prevents a testator from freely disposing of his or her property (1) if there are children or representatives of the children, and/or (2) if the decedent's ascendants are still living.

Wills.--Three forms of wills are recognized in Belgium: the holographic will; the notarial will; and the mystic will. These forms and the requirements to make them valid are similar to those in France and other European code systems.

Foreign wills.--Belgian law recognizes as valid a foreign will if it is made either in the form prescribed by the law of the place where it was drawn or in the form prescribed by national law.8/

Other Municipal Laws Relevant to Foreign Investment in Real Estate

Forms of business enterprise.--The formation of business entities in Belgium is regulated by Title IX of the Commercial Code, as amended by the Law of March 6, 1973, by which the provisions of the EEC Commission's directive of March 9, 1968, concerning the disclosure of certain corporate information in the interests of third parties was added.

Seven types of business forms are available under the Belgian Code: partnerships (societe en nom collectif); limited partnerships (societe en commandite simple); partnerships with limited liability (societe de personnes a responsibilite limitee--SPRL); company with limited liability (societe en commandite par actions); corporation (societe anonyme -- S.A.); cooperative (societe cooperative -- SC); and credit union (union de credit). Foreigners ordinarily invest in Belgium in the form of corporations or branches of foreign corporations.9/

Commercial register.--Before doing business, all business operations must register. An owner who operates without a license or outside of registration is subject to a fine.

Laws Applicable Primarily to Foreign Investors

Laws applicable primarily to foreign investment in real estate.--In general, Belgium encourages foreign direct investment. No substantive

8/ Id. at 3361.
9/ U.S. Dept. of Commerce, Marketing in Belgium/Luxembourg, OBR 78-46, at 33-34 (Sept., 1978).

laws prohibit foreign ownership of real estate in Belgium. No regulations exist against majority ownership of Belgian companies or of real property.

Authoritative sources differ as to whether procedural restrictions exist. A U.S. Department of Commerce Report states that, after securing the approval of the Ministry of Finance, a foreigner encounters no general prohibitions against foreign ownership of either business entities or real property.10/ However, the Belgian Industrial Section of the Consulate's Office in New York City states that such approval is not required and, since World War II, has never been required. The absence of reporting or authorization requirements relating to foreign investment in Belgian real estate has been confirmed by official Belgian Government sources.11/

Belgium has several government investment incentive programs of which foreigners investing in income-producing property may take advantage.12/

Currency restrictions.--In practice, freedom of exchange exists for all purposes in Belgium.13/ Foreign exchange transfers in Belgium are approved either under general regulations or under prior authorization by the Institute Belgo-Luxembourgeois du Change (IBLC). Certain transactions, such as the importation and exportation of goods, commission and brokerage fees, royalties, and technical assistance payments, involving more than BF 10 million, require prior authorization from the Exchange Control Board.

Belgium has a two-tier foreign exchange system in which there are two exchange markets, the official (or regulated) and the free. Most commercial transactions are settled in the official market and most capital transactions in the free. No registration is required for capital, loans, technology agreements, etc.

Foreign capital may come into Belgium freely through either the free or the official exchange markets. Direct capital investment in existing companies or in companies to be established can occur without the specific authorization of the IBLC.

During the intitial investment, foreign investors can secure from the IBLC a guarantee that authorization for the repatriation of foreign capital and of income derived from its investment will be given at any

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10/ Id. at 32.

11/ Phone conversations of March 29, 1979, with Jean deRuyt, Vice Consul Industrial Section, Belgian Consulate General. His information was confirmed by the Ministry of Economic Affairs, which asked also the Min. of Finance and the Min. of Agriculture. Phone conversation with Mr. de Ruyt of April 4, 1979.

12/ U.S. Dept. of Commerce, supra note 9, at 32-33.

13/ Price Waterhouse, Doing Business in Belgium 10-11 (June, 1978).

time. If the funds are to be repatriated within a 3-year period, however, the guarantee cannot usually be granted.[14/]

Internal and external financing.--No restrictions exist to prevent Belgian banks from granting credit to foreign-owned companies without limitation. Guarantees may be required. In addition to the real estate financing discussed above, commercial banks give medium and long-term credits for investments in fixed assets, covering 50 to 60 percent of the investment cost, usually for a 5- to 6-year period or more in certain cases.[15/]

Taxation

Individual income tax.--Individuals resident in Belgium are taxed on their total income from all sources at progressive rates ranging up to 60 percent payable on that portion of net income in excess of 4 million BFr. Nonresidents of Belgium are subject to nonresident income tax on their income earned or collected in Belgium.

No capital gains taxes exist in Belgium. However, when individuals sell land within 8 years after its acquisition, a special tax at the rate of 15 percent is assessed. This tax is applied to land on which buildings are constructed when the sales price of the building is less than 30 percent of the total sales price. Residents of Belgium who sell shares also are taxed on their gains.[16/]

Real estate tax.--A Federal tax of 3 percent of the cadastral value, the deemed rental value which is periodically determined for all property in Belgium, is imposed and must be prepayed. The provincial and local governments levy supplemental taxes, which vary from 2 to 5 percent in the provinces and are up to 20 percent in local governments. A credit can be taken for these taxes against personal or corporate income tax liability up to 20 percent of the cadastral value. In the event that combined provincial and local taxes exceed 20 percent, any excess may be charged as a deductible expense against income.[17/]

Until recently, it has not been clear whether nonresidents owning real property in Belgium incurred taxes. As is discussed below, the U.S.-Belgian tax treaty gives Belgium the right to tax income from real property earned by U.S. nationals and companies. On February 7, 1972, the Belgian tax authorities issued a note that nonresident legal entities renting out real property in Belgium are deemed to have a permanent establishment in Belgium and that they are liable to full tax on this rental income pursuant to Article 148(1) of the Belgian Tax Code.

14/ U.S. Dept. of Commerce, *supra* note 9, at 32.
15/ U.S. Dept. of Commerce, *supra* note 9, at 32.
16/ *Id.* at 91-92.
17/ *Id.* at 92; Cosner, *supra* note 1, at 76-77.

In certain instances, the prepayment of tax may not be imposed, such as the case in which a taxpayer is given a 5-year exemption under investment incentive laws.[18]

The value-added tax.--Since 1971, the value-added tax (VAT) has applied in Belgium as follows: 25 percent to luxury items; 14 percent to merchandise and services having a special economic, social, or cultural interest--including most real estate fees and commissions; and the sale of new buildings.

Registration taxes.--The conveyance of real estate located in Belgium must be registered and a registration tax at the rate of 12.5 percent on the value of the real estate is normally imposed. The tax is ordinarily imposed on the price set forth in the sales agreements, but--if it is below the market value--tax authorities are permitted to substitute the market value and to impose a penalty ranging between 10 and 20 percent of the tax avoided.

A registration tax is not due on a sale by a person who is subject to the value added tax on buildings under construction or which have been built recently. In such a case, the sale will be subject to VAT and not registration tax.

Various other registration taxes may be due on real property. For instance, contracts in writing for the leasing or subleasing of real property located in Belgium, and for the assignment of such leases, must be registered, with a registration tax being imposed at a rate of 0.2 percent of the total value of the lease contract (total amount of the rents and other charges payable by the tenant). In the event the lease contract does not provide what charges will be borne by a tenant in addition to rent, the tax authorities can themselves set the amount of charges. If the lease does not set forth its duration, the tax will be imposed on a presumed duration of 10 years. Ordinarily, leases are written and registered because a lease agreement which has not been registered cannot be the subject of legal proceedings since it cannot be invoked or enforced in court. Lease agreements usually state that the registration tax is payable by the tenant.[19]

Corporate taxation.--The corporate income tax imposed on business profits earned by corporations is based on an imputation system. The income of the company is taxed. In addition, dividends distributed are subject to a withholding tax of 20 percent. The shareholder residing in Belgium is entitled to the two following tax credits: the above-mentioned withholding tax and a tax credit of 57.5 percent of the net dividend collected.[20]

18/ J. Chown & M. Edwardes-Ker, The Acquisition of Assets, Companies and Real Estate in Belgium, France, Germany, the Netherlands and the U.K. 27 (1974).

19/ Id. at 28-30.

20/ Price Waterhouse, supra note 13, at 58-59.

International Agreements

Treaty of Friendship, Commerce, and Navigation.[21/]--Despite the relatively recent signing of this FCN treaty, the provisions concerning the leasing, acquiriing, owning and holding of land are not explicit. Instead, the treaty implicitly provides protection for property rights. For instance, property that U.S. nationals and companies own within Belgium is entitled to "constant security therein through full legal and judicial protection."[22/] Further, the treaty provides that Belgium shall not take unreasonable or discriminatory measures that will impair the acquired rights and interests within its territories of nationals and companies of the United States in the enterprises which they have established, in their capital, etc.[23/] Most of the other FCN treaties which the United States has concluded contain more specific protection of property rights.

Belgium expressly reserves the right in the treaty to determine the extent to which U.S. nationals and companies may establish, acquire interests in, or carry on enterprises engaged in Belgium in the exploitation of land or other natural resources.[24/]

Under the treaty, U.S. nationals and companies may not have their property expropriated in Belgium except for public benefit and with prompt payment of just compensation. The compensation must be in an effectively realizable form and must represent the full equivalent of the property taken. In addition, Belgium must provide sufficiently for such compensation no later than the time of taking for the determination and payment thereof. U.S. nationals and companies have a right to national treatment with respect to expropriation and compensation.[25/]

U.S. nationals have a right to national treatment in organizing companies for gain, and in maintaining subsidiaries, branches, agencies, and offices in Belgium.[26/]

U.S. nationals and companies have a right to national treatment in obtaining access to Belgian courts and administrative tribunals.[27/]

U.S. nationals and companies have a right to most-favored-nation treatment in Belgium on the payment of taxes, fees, or charges imposed on or applied to income, capital, transactions, activities, or any other object.[28/]

21/ Signed at Brussels, Feb. 21, 1961, entered into force Oct. 3, 1963. 14 U.S.T. 1284; T.I.A.S. 5432; 480 U.N.T.S. 149.
22/ *Id.* Art. 4(1).
23/ *Id.* Art. 4(2).
24/ *Id.* Art. 5(5).
25/ *Id.* Art. 4(3).
26/ *Id.* Art. 6.
27/ *Id.* Art. 3.
28/ *Id.* Art. 9.

U.S.-Belgian income tax treaty.--The treaty provides that income realized by U.S. persons from real property, including royalties in respect of the operation of mines, quarries, or other natural resources, and gains derived from the sale, exchange, or other disposition of such property, or of the right giving rise to such royalties in Belgium may be taxed in Belgium. Interest on indebtedness secured by real property or secured by a right giving rise to royalties in respect to the operation mines, quarries, or other natural resources are not considered as income from real property. These provisions also apply to income derived from the usufruct, direct use, letting or use in any other form of profit.[29/]

Under the treaty, gains realized by a resident of the U.S. from the sale, exchange, or other disposition of capital assets are exempt from tax in Belgium unless the:

(1) Gain is from the sale, exchange, or other disposition of the treaty;

(2) Recipient of the gain, being resident in the United States, has a permanent establishment or maintains a fixed base in Belgium and the property giving rise to the gain is effectively connected with such permanent establishment or such fixed base; or

(3) Recipient of the gain, although an individual resident in the United States, is present in Belgium for a period or periods aggregating 183 days or more in the taxable year.[30/]

A withholding tax of no more than 15 percent can be imposed on dividends distributed by a Belgian affiliate to the U.S. corporation, provided that the dividends come from shares which are not effectively connected with a permanent establishment in Belgium of a U.S. resident.[31/]

A withholding tax of no more than 15 percent ordinarily is imposed on earnings from interest realized by U.S. persons from Belgium.[32/]

29/ Id. Art. 6.
30/ Id. Art. 13.
31/ Id. Art. 10.
32/ Id. Art. 11.

Brazil

Introduction to the Legal System

Under the 1967 constitution, as amended by Institutional Acts and Complementary Acts, Brazil is a Federal Republic made up of 22 States, 4 territories, and the Federal District.

Each State has its own constitution with an elected governor and chamber of deputies.

The executive branch of the Government is, pursuant to the constitution, headed by the President, who is elected by Congress every 5 years and is not eligible for a consecutive term. The legislative power ordinarily is exercised by the National Congress which consists of a Chamber of Deputies and a Federal Senate.

The Brazilian legal system is based on a civil code system akin to that of Germany.[1/]

The Law Governing Real Property

The law of immovable property.--The Brazilian Civil Code makes the usual distinction between immovable and movable property.

Brazil maintains registries, headed by public officials (registrars), for the recording of deeds, mortgages and other documents for authentication and conservation and establishing their validity against third parties.

All deeds and mortgages are required to be registered, an "extract" being entered on the registrar's books, and several other instruments may be registered, such as leases and powers of attorney. If leases are recorded, and, if the agreement so provides, they become a lien on the property.[2/]

Sale and transfer of land.--An agreement to sell real estate may be recorded. In the event the seller refuses to execute the final conveyance, the courts may adjudicate the matter.[3/]

1/ See O. Gomes, Historical and Sociological Roots of the Brazilian Civil Code, 1 Inter-Amer.L.Rev. 331-86 (1959); P.G. Garland, American-Brazilian Private International Law (1959); E.M. Borchard, Guide to the Law and Legal Literature of Argentina, Brazil and Chile (Library of Congress, 1971).

2/ 7 Martindale-Hubbell Law Directory 3399 (1979).

3/ Id. at 3399.

Deeds which convey real property must, unless a minimal value is involved, be public instruments drawn up by a notary on his books, maintained as official records, signed by the parties, the notary, and two witnesses, and they must be recorded or registered in the public registry in order to be valid conveyances.4/

Family law and real property.--Unless there is an antenuptial contract to the contrary, the property of the husband and wife, except in certain enumerated cases, is considered community property, and it must be equally divided when death or separation dissolve the marriage or the union of property, respectively. Included in community property is all property owned by either party at the time of the marriage, and all property acquired during the marriage, and before death and separation, with certain exceptions, such as pensions, conditional gifts or legacies, promises of dowries, etc.

The husband is the administrator of the community property as well as of the wife's separate property. However, he is precluded, without his wife's consent, from alienating or encumbering real estate, litigating, or making gifts other than of small value. In the event a wife refuses to give her consent without sufficient reason, the court may supply her consent except with respect to her separate property.

The wife needs the husband's consent for the following matters: to alienate or encumber the real estate of her separate property; to litigate with respect to such real estate; to give bond; to make gifts over a minimal amount; and to accept or refuse inheritances or legacies. However, if the husband refuses to give his consent, it may in most cases be furnished by the court for good reasons. In addition, the husband's consent is presumed if the wife holds a public office or engages in a profession outside the home.

The spouses may enter into an antenuptial agreement with respect to property if they want to vary from most of the above-mentioned family law provisions. Such an agreement, to be valid, must be incorporated into the official record of the marriage.5/

Expropriation of property.--Expropriation can be carried out pursuant to constitutional law and the general law of civil procedure. Federal law authorizes the taking of private property for "public use."6/ In addition, a Federal statute7/ authorizes expropriation of property in the "social interest." "Social interest" includes: utilization of

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4/ Id. at 3392.
5/ 7 Martindale-Hubbell Law Directory, 3394 (1979), citing Civil Code, arts. 240-314; Commercial Code, art. 1.
6/ Law of Expropriation, Vademecum Forense 146 (5th ed. 1959) [hereinafter cited as Vademecum Forense].
7/ Law No. 4132 of Sept. 10, 1962, 7 Colecao das Leis de 1962, Altos de Poder Legislativo (Leis de Outubro a Dezembro) 144.

unproductive or insufficiently exploited property; promotion of agriculture; urban development; utilization of public utilities considered not properly used; and the preservation of natural resources.

Procedurally, expropriation consists of two principal steps: (1) the declaration of public use accompanied by offer of compensation, an administrative act of the expropriating authorities; and (2) the action for expropriation, a judicial proceeding in which the expropriating authority is the plaintiff.[8/] The issue of just compensation has resulted in substantial litigation.[9/]

Descent and Distribution

Intestate and testate succession.--The Brazilian Civil Code provides that succession may be by testamentary disposition or by intestacy. If a decedent is survived by lineal descendants or ancestors, he or she may validly dispose by testament of only one-half of his individual estate. However, a spouse can be excluded from a share in the estate. The order of intestate succession is the following: (1) descendants; (2) ascendants; (3) surviving spouse, not judicially separated from the decedent at the time of his or her death; (4) collaterals to the fourth degree; and (5) the state, federal district, or the national governments.

Succession among descendants occurs *per stirpes*, with the right of representation inuring to those in direct line of descent, but not to those in line with the ascent. An heir has a right to accept or reject.[10/]

If a testator has lineal descendants, parents, or grandparents, he or she cannot dispose of more than one-half of the estate, except in special cases. The other half goes to the descendants, or if none, to his other necessary heirs. The testator may, however, decide that a portion of his estate which he cannot alienate will be converted into property of a different kind, and that it will not be divided or alienated by the heirs, or that property passing to a female heir will not be subject to the control of her husband.[11/]

Wills.--In Brazil wills must be either public, sealed, or private, with the exception of those relating to soldiers and sailors.

To be valid, a sealed will must be written by the testator or by another at his request, and signed by the testator or, if he cannot sign, by the person writing the will for him. It must be handed over by the testator in the presence of at least five witnesses to the notary. The testator

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8/ Decree-Law No. 3365, Vademecum Forense, *supra* note 6.

9/ *See* H. de Vries & J. Rodriguez-Novas, The Law of the Americas 152-57 (1965).

10/ 7 *Martindale-Hubbell Law Directory* 3392 (1979).

11/ *Id.* at 3404.

must declare that it is his or her will and that he or she wants it approved. The notary must then, in the presence of all, in writing approve the will, which approval must start immediately after the last word of the will, if space permits, and must be read by the notary and signed by him, the witnesses, and the testator if he is able, or for him by one of the witnesses. The notary then seals and stitches the will and delivers it to the testator. A sealed will can be written in a foreign language.

To be valid, a private will must be written and signed by the testator and read and signed by five witnesses. A private will can be written in a foreign language which is understood by the witnesses. To probate a private will, at least three of the witnesses must be produced.[12/]

<u>Intestate and testate succession of aliens</u>.--In Brazil, intestate and testate succession is governed by the law of the domicile of the deceased, so that a person domiciled in the United States under Brazilian law would have U.S. law apply to determine how his or her estate would be disposed. However, if the alien is married to a Brazilian or leaves Brazilian children, the Brazilian law applies to property in Brazil.[13/]

Other Municipal Laws Relevant to Foreign Investment in Real Estate

<u>Forms of Business Enterprise</u>.--The forms of business enterprise recognized under Brazilian law and the formalities which must be observed in relation thereto are primarily contained in the Commercial Code, as amended by laws and decrees. Sole proprietorships and joint ventures are recognized.

A foreign investor may operate in Brazil through a branch. In order to start a branch and subsequently to alter the by-laws, a foreign corporation must obtain the approval of the Brazilian Government.[14/]

The most commonly used commercial entity in Brazil is the Brazilian corporation, known as the <u>sociedade anonima</u>. Brazilian law requires that corporations engaged in certain activities including real estate operations may issue nominative shares only.[15/]

A company may obtain an open capital company status, which is a company which is publicly owned with its shares quoted on the stock exchange, if initially at least 20 percent of the ordinary shares issued be held by a number of shareholders determined by the Central Bank. Open status is

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12/ <u>Id</u>. at 3403-04.
13/ Decree-Law 4657 of Sept. 4, 1942, in <u>id</u>. at 3384.
14/ Price Waterhouse, Doing Business in Brazil 19 (1972 & 1975 supp.).
15/ <u>Id</u>. at 8-9.

given initially for 1 or 2 years and may be renewed for further periods of 2 years under certain conditions.[16]

Three types of partnerships may be utilized by investors in Brazil. The first is the mixed partnership (em comandita) consisting of silent partners whose liability is limited to the amount of their capital and active partners with unlimited liability. A second type is the ordinary partnership (coletiva). It consists of two or more general partners with each partner having a right to participate in the management. A third type is the mixed partnership (capital e industria), which is formed with some partners contributing capital and others contributing services. While the liability of capital partners is unlimited, that of the partners contributing services is limited, unless they participate in management, in which case they also have unlimited liability.[17]

A private limited company ("limitada" or sociedade de responsabilidade limitada por quotas) is a company which is an entity distinct from the members forming it. To form a private limited company there must be at least two members with capital being in the form of quotas with a fixed unit value, as specified in the deed of constitution.

Commercial register.—Prior to doing business, certain commercial entities such as the corporation must file enumerated documents with the Registry of Commerce. The Registry of Commerce issues an authenticated copy of documents filed concerning the constitution of the corporation or a certificate thereof, which together with the certificate of registration must be published in the Official Gazette. A company is not permitted to conduct business until registration has been completed.[18]

Laws Applicable Primarily to Foreign Investors

Laws on foreign investment in real estate.--Several substantive restrictions are imposed by Brazil on foreign investment in Brazilian real estate:

An alien may not acquire over 2,000 hectares of land.[19]

An important law which restricts foreign investment in Brazilian rural and agricultural land is "Law 5,709 of 1971, Regulating the Acquisition of Rural Real Property by Foreigners Resident in the Country or Foreign Juridical Persons Authorized to Operate in Brazil."[20]

16/ Id. at 16-17.
17/ Id. at 17.
18/ Id. at 18-19.
19/ Decree Law 6430 of April 17, 1944.
20/ Constitution of Brazil, art. 168.

The law provides that a foreigner or a Brazilian enterprise of which a majority of the stock is held by persons residing or having their headquarters abroad may only acquire rural real property in the manner prescribed by this law.21/

A foreigner who intends to immigrate to Brazil is permitted to purchase rural real estate in Brazil, provided that within 3 years from the date of the agreement, he or she establishes domicile in Brazil and works the property. However, if the intended purchaser does not fulfill these conditions, the agreement shall be void and such person shall be prohibited from acquiring real estate in any manner.22/

The law provides that a foreigner may not acquire more than 50 modules of rural property in a continuous area. However, a foreigner is free to acquire property in an area not exceeding 3 modules, regardless of any authorization or license, with the exception of general exigencies determined by law. The executive has the authority to lower the requirements for foreigners wanting to acquire an area comprising between 3 and 50 modules of rural land. The President of Brazil, in consultation with the National Security Council, is empowered to impose more stringent restrictions on the acquisition by foreigners of rural real estate.23/

Private settlement firms which parcel lots must convey for occupation by Brazilians at least 30 percent of the total area.24/

Foreign entities can only acquire rural property to be used for agricultural, livestock, industrial, or land settlement projects which are pursuant to the objectives set forth in their charters. These projects must receive the prior approval of the Ministry of Agriculture, in consultation with competent Federal authorities for regional development in the area concerned.25/

The law requires that the following types of corporations cannot be in bearer shares, but rather must be nominative: those engaged in the parceling (or breaking into lots) of rural land; those which directly engage in cultivating or exploiting rural lands; and those which are proprietors of rural properties not pursuing the objectives set forth in their charters.26/

21/ Law 5,709 of Oct. 7, 1971, "Regulating the Acquisition of Rural Real Property by Foreigners Resident in the Country or Foreign Juridical Persons Authorized to Operate in Brazil," Art. 2., as translated into English in O.A.S., A Comparative Study of Latin American Legislation on the Regulation and Control of Private Foreign Investment 134 *et seq.* (1976) [hereinafter cited as O.A.S.].

22/ *Id.*

23/ *Id.* Art. 3.

24/ *Id.* Art. 4.

25/ *Id.* Art. 5.

26/ *Id.* Art. 6.

Under this law, a foreign person or entity cannot acquire property which is situated in an area considered indispensable to national security without the prior authorization of the general secretariat.[27]

The law provides that the total area of rural properties belonging to foreigners cannot exceed one-fourth of the land area of the municipalities in which they are located, as verified by the Real Property Register, based on the special cadastre discussed below. Furthermore, persons of the same nationality are forbidden to be proprietors in each Brazilian muncipality of more than 40 percent of one-fourth of the land area mentioned above in this paragraph.[28]

The law excludes from the limitations described above the acquisition of land in the following circumstances: those involving less than three modules; those which have been subject to purchase and sale, to a pledge to purchase or sell, to cession or cession pledge, either by registration through a public notary or by private instrument duly legalized in the competent register; those which have been surveyed by the Government on behalf of the intended purchaser, before March 10, 1969; and those made by a person who either has a Brazilian child or else was married to a Brazilian under a community property arrangement. In addition, the President of the Republic has the authority by decree to authorize an acquisition above the limits mentioned in the above paragraph in the case of rural property, which is to be used in a project that has priority in the development plans of the country.[29]

It is provided that the acquisition of rural property which violates Law 5,709 of October, 1971, is null and void. Furthermore, the notary who drafts the legal instrument and the registrar who transcribes it are civilly liable for any damages caused by the contracting parties, in addition to any criminal liability for prevarication or fraud.[30]

The law requires that entities enumerated as being subject to this law which were already organized upon the effective date of the legislation must report on the rural lands that they own or exploit within 6 months to the Minister of Agriculture. Furthermore, those corporations which fail, although required, to convert unregistered shares into registered shares are subject to dissolution.[31]

The law provides for a mechanism on a national basis for registration and statistical reporting of the acquisition by foreign persons of rural properties. Registration of such acquisitions must contain the following information: the identity of the acquirer; proof of residence in the national territory; and, if it is required, the authorization of the competent organ or prior consent of the general secretariat of the National Security Council. In addition, juridical persons (entities)

27/ Id. Art. 12.
28/ Id. Art. 12.
29/ Id. Art. 12.
30/ Id. Art. 15.
31/ Id. Art. 16.

must show their authorization to acquire the rural property as well as documents attesting to its organization and license to operate in Brazil.32/

Furthermore, the law requires that the Archives of the Real Property Register maintain a special cadastre in a book kept for the purpose of registering the acquisition of rural lands by foreigners. The cadastre must contain the following information: a statement of the document setting forth the identity of the contracting parties or of the respective acts or organization if a commercial entity is involved; a descriptive memorandum of the property, its area, characteristics, boundaries, and geographic position; and a transcription of the authorization by the competent authority if such is the case.33/

The Archives of the Real Property Register is required to send quarterly to the State Corregadoria of Justice and to the Ministry of Agriculture a report of the acquisition of rural lands by foreign persons, containing the data required to be furnished in the registration reports. In the event the property is located in an area considered indispensable to national security, the above-mentioned report also must be transmitted to the general secretariat of the National Security Council.

Internal and external financing.--In legislation enacted in 1964, Brazil requires the registration of all foreign capital, in whatever form it is introduced, as well as for foreign financial operation. The following elements must be recorded: foreign capital entering the country in the form of direct investment or loan, whether in money or goods; remittances abroad made as repatriation or income from such capital profits, dividends, interest, amortization, as well as royalties, payment for technical assistance or for any other account covering transfer of returns out of the country; reinvestment of profits accruing from foreign capital; and changes in the monetary evaluation of corporate capital made in accordance with the law. Registration of such foreign capital must be made within 30 days of entering the country. Companies or individuals wanting to transfer abroad profits, dividends, interest amortizations, royalties, technical fees, etc. must submit to the Central Bank and the Income Tax Division contracts and documents required to justify remittance.34/

Restrictions are imposed on remitting profits abroad as follows: (1) In the case of capital applied to produce goods or services for sumptuary use, remittance is limited to 8 percent annually of capital registered with the Central Bank. However, if foreign trade is in a severe imbalance, the Central Bank may restrict such remittances to 5 percent of the registered capital, and stop repatriation of capital. If profits exceed the above limits, they will be considered repatriation of capital and will be deducted accordingly from corresponding registration for purposes

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32/ Id. Art. 9.

33/ Id. Art. 10.

34/ Law 4,131 of Sept. 3, 1962, as amended by Law 4,390 of Aug. 29, 1964, which is the basic statute on foreign capital in Brazil, in O.A.S., supra note 21, at 57-58.

of future remittances. (2) In all other cases, remittances will not be limited. However, if they should average in any 3-year period more than 12 percent of registered capital, the excess will be subject to the following supplementary income tax: 40 percent, on remittances of profits between 12 and 15 percent of registered capital plus reinvestment; 50 percent on remittances between 15 and 25 percent of registered values; and 60 percent on remittances above 25 percent of registered capital plus reinvestments.[35]

Enterprises, the majority of whose capital and votes are held by foreigners, as well as subsidiaries of foreign enterprises, do not have access to official credit sources until after they have started their operations. However, projects which are considered of prime interest to the national economy are not subject to this restriction, provided that the executive power specially authorizes the exception.

Official financial institutions are not allowed to grant credit for new investments in the fixed assets of a foreign enterprise unless the investments are to impact an economic sector of prime national importance, as defined by executive decree. This provision applies also to resources provided by public investment funds.[36]

Taxation

Introduction.--Jurisdiction to tax is exercised over individuals residing or domiciled in Brazil, individual concerns, and associations and corporations domiciled in Brazil. Commercial entities are required to register in a special registry maintained by the Income Tax Bureau. No industrial or commercial enterprise may operate if it is not registered. Individual taxpayers register in the "Cadastre of Individual Taxpayers." When an income tax return is filed, individual residents must file an inventory of their personal and real property.

Personal income tax.--The income of individuals is categorized into eight schedules. For instance, Schedule E includes income from leasing personal or real property and G includes income from extractive, agricultural, or livestock industries. Schedule H is a catchall, embracing any other income from property or work not included in Schedules A through G, including unexplained increases of assets, imputed income established on indicia of wealth, and so forth.

The rate of taxation on individuals is progressive, starting from 4 percent on Cr.$26,001 to 50 percent above Cr.$500,000.

Gains derived by individuals from selling real property are not subject to taxation, unless the seller is a dealer--a person dedicated to real

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35/ 7 Martindale-Hubbell Law Directory 3391 (1979).

36/ Brazil Law 4,131 of Sept. 3, 1962, as amended; and Decree 55,762 as translated and discussed in O.A.S., *supra* note 21, at 178-79, 185.

property activities (e.g., an estate agent, building activities, or subdivision of land). A dealer is subject to tax on gains from these activities at the rate of 25 percent.[37] Gains derived from the transfer of real estate form part of fixed assets of a company, provided that the total price is received within a period of 5 years, and is a minimum of 40 percent paid within the first 12 months, as from the date of contract, are exempt from tax.[38]

Corporate taxation.--All legal entities deriving income pursuant to the income tax regulations are subject to income tax. Individuals who carry on a business, or an association of two or more persons in any business activity without registering, are considered to be entities for tax purposes.[39]

Special provisions of corporate taxation apply to habitual sales of real property, the division into parcels for sale of land, and agricultural and livestock concerns.[40]

The rate of taxation imposed on corporations and entities is 30 percent.

With certain exceptions, dividends and profits distributed in any form are subject to tax imposed upon the distributing entity at the rate of 5 percent. The same rate applies to profits sent or credited by subsidiaries or branches to parents abroad. Reserves which are created from profits when they have reached an amount equal to paid-in capital are subject to 25 percent tax.[41]

A withholding tax of 25 percent applies to any taxable income paid or credited to individuals or corporations residing or domiciled abroad who have not been in Brazil 12 months or more and to Brazilian residents living 12 months or more abroad.

If branches of foreign corporations in Brazil reinvest their earnings in Brazil, thereby increasing corporate capital, they are subject to a reduced withholding tax of 15 percent.

Dividends, benefits, or other income withholding taxes on nonresidents or nondomiciliaries are raised with a surcharge to 20 percent when the payor is engaged in activities deemed of minor interest for the national economy.

In the event that individuals or corporations with residence or domicile abroad receive dividends or profits which exceed 12 percent of capital

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37/ Law 3468 of Nov. 28, 1958, Art. 81; Law 4506 of Nov. 30, 1964, Art. 41, Decree-Law 94 of Dec. 30, 1964, Art. 2 (Brazil) in 7 Martindale-Hubbell Law Directory 3400 (1979).

38/ Law 1250 of Feb. 26, 1973, Administrative Decree 101 of May 23, 1973 (Brazil) in 7 Martindale-Hubbell Law Directory 3401 (1979).

39/ Price Waterhouse, *supra* note 14, at 31.

40/ 7 Martindale-Hubbell Law Directory 3401 (1979).

41/ *Id.* at 3402-03.

for a 3-year period, additional tax will be imposed at the rate of 40 percent if remittances constitute more than 12 to 15 percent of basis; 50 percent if they are more than 15 to 25 percent; and 60 percent if they are more than 25 percent of basis. This tax is withheld whenever any remittance surpasses the stated percentages of a 3-year period.[42]

Real property transfer tax.--Although there is no Federal transfer tax on real property, the States and the Federal District do impose such a tax. It is levied only on the transfer of real estate at the rates of 1 percent on sales and 2 percent on gifts or inheritance.[43]

Inheritance tax.--Under the Federal Constitution, the States have exclusive power to tax transfers of property due to death. The tax is levied at a progressive rate and the percentage increases according to the amount of inheritance and the degree of the relationship.[44]

Municipal property tax.--A municipal property tax is imposed each year on the assessed value of the property. The rate of tax varies according to the municipality. In Sao Paul and Rio de Janeiro, they were recently 1.2 percent and 0.8 percent, respectively.[45]

International Agreements

A double taxation agreement has been concluded between the United States and Brazil, but has not been ratified by the U.S. Senate, and, therefore, is not in force.

U.S.-Brazil convention of peace, friendship, commerce, and navigation.[46]--Although no Convention of Friendship, Commerce and Navigation is in force between the two countries, a similar Convention is in force.

This Convention provides that U.S. persons and property are to be accorded "special protection" in Brazil and are to have free access to the tribunals of justice on the same terms which are usual and customary with the natives or citizens of Brazil.[47]

Under the Convention, U.S. citizens or subjects have the right to dispose of their personal goods within Brazil by sale, donation, testament, or otherwise. Furthermore, the representatives of such U.S.

42/ *Id*. at 3402-03.
43/ Price Waterhouse, *supra* note 14, at 56.
44/ 7 *Martindale-Hubbell Law Directory* 3402 (1979).
45/ Price Waterhouse, *supra* note 14, at 57.
46/ U.S.-Brazil Convention of Peace, Friendship, Commerce, and Navigation, Dec. 12, 1828, United States-Brazil, 8 Stat. 390, T.S. No. 34, 5 Bevans 792.
47/ *Id*. Art. XII.

citizens or subjects can succeed to these personal goods, whether testate or intestate, and they may take possession thereof, either by themselves, or by others acting for them and dispose of the same at their will, paying only such taxes and fees as the residents of Brazil must pay in like circumstances. In the event that U.S. heirs of real estate are prevented from taking possession of the inheritance, on account of the status of aliens, they have 3 years to dispose of such property and withdraw the proceeds, subject only to such charges as those which are imposed by the laws of Brazil.48/

U.S.-Brazil agreement relating to investment guaranties.49/--The Agreement provides that when U.S. nationals propose to make investments, which are guaranteed under this Agreement, in a project or activity within Brazil, the two Governments shall, on the request of either, consult concerning the project or activity and its contribution to economic and social development.50/

Under the Agreement, if the U.S. Government makes a payment to an investor under a guaranty issued pursuant to the present Agreement, the Government of Brazil must recognize the transfer to the U.S. Government of any currency, credits, assets, or investments on account of which such payment is made, as well as the succession of the U.S. Government to any right, claim, privilege, or cause of action, existing or future, in connection therewith.51/ In addition, the Agreement provides that to the extent that the laws of Brazil partially or wholly preclude the acquisition of any interest in any property within its national territory by the United States, the Government of Brazil must allow such investor and the United States to make appropriate arrangements pursuant to which such interests are transferred to an entity permitted to own such interests under the laws of Brazil.52/

Rights to money in Brazilian currency acquired by the U.S. Government through subrogation must be given treatment neither less nor more favorable than that accorded to funds of nationals of Brazil deriving from the investments like those of the subrogating investor.53/

The two Governments also agree to settle differences over the interpretation of the agreement through negotiation, or in absence of an agreement thereon, by arbitration.54/

The significance of this type of agreement is discussed in the first part of this report (the U.S. Investment Guaranty Program).

48/ Id. Art. XI.
49/ Feb. 6, 1965, United States-Brazil, 18 U.S.T. 1807, T.I.A.S. No. 6397, 719 U.N.T.S. 3.
50/ Id. Art. I.
51/ Id. Art. III(1).
52/ Id. Art. III(2).
53/ Id. Art. IV.
54/ Id. Art. VI.

Canada

Introduction to its Legal System

In 1867, by Royal proclamation Canada was established under provisions of the British North America Act, which the Parliament of the United Kingdom enacted. The Act provided for union into one federation of Provinces, of which there are now 10. Canada also has two territories.

The jurisdictional competences of the Federal and Provincial Governments are as follows. The Federal Government has legislative authority in matters concerning the regulation of national and international trade and commerce, national defense, navigation and shipping, and banking and currency. The Provinces have legislative authority in all matters relating to property, education, municipal government, and other matters of local concern.

The Canadian Parliament (or Federal legislature) is composed of a House of Commons elected by the people for a term not in excess of 5 years and a Senate, whose members are appointed for life by the Governor General on the recommendation of the Prime Minister. The Prime Minister is the effective head of the administration and ordinarily is the leader of the majority party in the House of Commons.

Climate and Laws Governing Real Property

Climate.--The Provinces have the authority and have enacted legislation governing the licensing and conduct of real estate brokers. In Ontario, for example, the Lieutenant-Governor in Council promulgates regulations setting forth the amount and form of bonds to be supplied by brokers and salesmen and the amount of fees payable upon registration or renewal.

A person cannot bring an action to recover a commission unless the agreement is in writing signed by the party to be charged. A real estate commission must be either an agreed sum or a percentage of a sale price or rental. Every listing agreement must specify when it expires, and a copy of the agreement must be delivered to the person signing it immediately after it is executed.

Registered real estate brokers are considered to be registered mortgage brokers.[1/]

The Canadian commercial banking system is made up of 10 privately owned banks with numerous branches throughout the country. All banks doing business in Canada are chartered by Parliament and operate under the provisions of the Federal Bank Act. The Act restricts intercorporate financial relationships between chartered banks and other financial

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1/ 7 Martindale-Hubbell Law Directory 3171 (1979).

enterprises and limits bank ownership of any Canadian corporation to 10 percent of the voting shares. It also requires that no more than one-fifth of the directors of any company may become directors of a bank.

Among the other financial institutions in Canada are provincial government savings banks, cooperative credit unions, trust and mortgage companies, small loan companies, and insurance companies. The principal sources of mortgage funds are Canadian chartered banks, mortgage companies, trust companies, and insurance companies.

Trust companies serve as financial intermediaries in the same way as mortgage companies, chartered banks, or savings and other financial institutions. They are the only corporations in Canada with the authority to act as trustees for property interests and to conduct other fiduciary business.[2/]

The law governing real property.--In Canada, real property law is derived primarily from the English common law. Much of the statutory law has been enacted by the provinces, although Federal legislation on real estate also exists.

Two different systems of land registration are used in Canada and simultaneously in some of the provinces. For instance, in Toronto and the surrounding area, a particular parcel of land can be registered under either system.

After a contract for the sale and purchase of property is concluded, the purchaser has the right to require the vendor to clear up any defects in title. To ascertain whether any title defects exist, a title search must be made. In the registry system, the search goes back at least 40 years to a good "root of title."

Title insurance is available in Canada. In many cases, however, a purchaser instead relies on the title opinion of his lawyer. As a result, if a defect in the title arises after the completion of the transaction, the purchaser brings an action in damages against his lawyer.[3/]

In most parts of Canada, except the Province of Quebec, a typical conveyance of real estate occurs in two parts. After preliminary contract and negotiations, the purchaser makes an offer of purchase to the vendor. If it is accepted, an agreement of purchase and sale is executed by the purchaser, the vendor, and the real estate agent. During the period between the execution of the agreement of purchase and sale and the closing date of the transaction, the purchaser has the title searched.

2/ Price Waterhouse, Doing Business in Canada 25-26 (1975).

3/ Scace, When an American Plans to Acquire Property in Canada: Some Questions and Related Probate Problems, 10 Real Property, Probate and Trust J. 364, 366 (1975).

In the second distinct phase of a real estate transaction, the closing takes place. The deed and the unpaid balance of the purchase price are exchanged by the purchaser and the vendor. Thereafter, the purchaser registers the deed in the appropriate office, thereby giving actual notice of the change of ownership.[4/]

Family law is determined by the province in which the relationship or the real property are located. Ontario is used for illustration purposes.

Although no community property law exists in Ontario, dower rights at common law are preserved. As a result, a widow has a right to a life interest in one-third of the total value of any land to which her husband had legal title during their married life. Dower is an inchoate right, which attaches to land immediately after the acquisition by the husband of the legal estate therein. Dower rights can only be defeated when the wife bars her dower by signing the deed of transfer. A wife having dower rights who does not sign a conveyance or transfer executed by her husband maintains her dower interest until her death.

If a nonresident (e.g., a resident of the United States) intends to sell real property acquired in Ontario, the purchaser should require that the wife of the nonresident sign the deed as a seller to bar or release her dower rights. The wife does not have dower rights where land is held by the husband and wife as joint tenants.[5/]

Descent and Distribution

Intestate and testate succession.--Succession is governed by the laws of the respective provinces. Using Ontario as an example, the Succession Reform Act of 1977, regulates the devolution of real and personal property of an intestate decedent. If no issue of a deceased survive, the spouse receives all of the estate. If issue do survive, the spouse receives $75,000 with the balance going as follows: one-third to the spouse and two-thirds to the children or their issue, if any, per stirpes, provided that if only one child survives, the spouse takes one-half and the child or his issue takes one-half. If there is no spouse, the children or their issue all take per stirpes. If there is neither spouse nor issue, the estate goes in the following order to: parents; brothers and sisters (or their issue); nephews and nieces and other next of kin.

Wills.--The requirements for making a valid will are made by the Provinces. In Ontario, the will must be in writing and executed at the end by the testator, or by some other person in his or her presence and by his or her direction. It is required that the signature of the testator be made or acknowledged by the testator in the presence of two or more

4/ Id. at 365-66.
5/ Id. at 366-67.

witnesses at the same time. Such witnesses must sign the will in the presence of the testator. The testator and the witnesses to the will must be 18 years of age. An executor can act as a witness, but a testamentary gift to a witness or the spouse of a witness is not valid.6/

Foreign wills.--If a U.S. resident who has real property in Ontario and makes a will in the United States, application must be made after the testator's death for ancillary letters probate to the surrogate court of the county wherein such real property is located. To obtain ancillary letters probate where the assets of the U.S. resident in Ontario consist of real property, it must be proved that the American will is executed in a way sufficient to convey real property under the laws of Ontario. In the event a U.S. will does not meet the requirements of a valid Ontario will, the executor appointed under the U.S. will must designate an administrator resident in Ontario for ancillary letters of administration with will annexed.7/

Other Municipal Laws Relevant to Foreign Investment in Real Estate

Forms of business enterprises.--The main forms of business enterprises available in Canada are companies, general and limited partnerships, and branches of foreign corporations.

The companies acts of all Canadian provinces except Ontario and Quebec enable a corporation to be incorporated either as a public corporation or as a private corporation. In some Provinces, private corporations are not required to publish their financial statements, whereas the financial statements of all public companies are open for inspection by the public.

Formation procedures.--There is no commercial register in Canada. Although procedures under which a new company is incorporated vary, depending upon whether a company is to be formed under Federal laws or under the legislation of one of the 10 Canadian provinces, the general requirements are similar.

The Canadian Business Corporations Act and Ontario law require that a company be incorporated by articles of incorporation prepared by the incorporators and certified by the Government. The Provinces of Manitoba, New Brunswick, Quebec, and Prince Edward Island provide for incorporation by letters patent. In each of the other Canadian Provinces, a memorandum and articles of association are filed with the provincial government for registration.8/

6/ Scace, *supra* note 3, at 367-68.
7/ *Id.* at 367-69.
8/ Price Waterhouse, *supra* note 1, at 27-28.

Laws Applicable Primarily to Foreign Investment

Laws on foreign investment.--Substantial legislation has been enacted in the last 5 years in Canada on the Federal and Provincial levels concerning acquisition by foreigners of real estate. Many of the laws are designed to limit, and in some instances to forbid, nonresidents from controlling land without developing it or without becoming residents of Canada. This discussion focuses on restrictions on acquisitions and speculative transactions. Legislation setting forth restrictions on foreign acquisition is found on the Federal level in the Foreign Investment Review Act (FIRA), and also in the legislation of six provinces.

Parliamentary authority to regulate foreign investment comes from the British North America Act of 1867[9/] which is the Canadian Constitution. The Act grants exclusive power to the Parliament to regulate aliens and trade and commerce.[10/] Control over agriculture is concurrent with the Provinces. However, provincial legislation conflicting with parliamentary acts is valid.[11/]

Both Federal and Provincial laws concerning foreign investment are best classified into those pertaining to privately held real estate and those pertaining to public or Crown lands.

Crown land held by the national Government is governed by the Territorial Lands Act[12/] and the Public Lands Grants Act.[13/] Neither of these Acts restricts alien rights. Regulations promulgated under the latter prohibit only grants of oil, gas, and mining leases to all noncitizens and foreign corporations.

The Provinces are granted exclusive authority under the British North America Act to regulate real property and the "management and sale of public lands belonging" to each Province.[14/] Legislation in the Provinces varies from positive guarantees to foreigners that their rights in real property are equal to those of Canadian citizens to specific prohibitions on alien acquisition of land. The laws of selected Provinces are discussed.[15/]

Most new businesses or acquisitions by foreigners or deemed foreigners, referred to as "noneligible persons," are subject to review by the

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9/ British North America Act of 1867, 30-31 Vict. c.3 (Can.).
10/ Id. secs. 91(25) and (2).
11/ Id. sec. 95.
12/ Can. Rev. Stat., c. T-6 (1970).
13/ Can. Rev. Stat., c. P-29 (1970).
14/ British North America Act of 1867, 30-31 Vict. c. 3, secs. 92(13) and 92(5).
15/ For Canadian provincial regulation of alien land investment, see Morse, Legal Structures Affecting International Real Estate Transactions, in Foreign Investment in U.S. Real Estate 297 (U.S.D.A., Economic Research Service 1976).

Foreign Investment Review Agency pursuant to the Foreign Investment Review Act (FIRA) and to approval by the Canadian Government.

A Canadian business enterprise.--A proposed real estate transaction of a foreign investor is subject to review and approval under the Foreign Investment Review Act when a proposed real estate acquisition is considered a "Canadian business enterprise" under the Act. Business is defined as any undertaking or enterprise carried on in anticipation of profits. Therefore, the principal issue of whether a foreign investor buys real estate or whether such investor is investing in a Canadian business enterprise is determined by both the nature of the real estate acquired and the activities to be undertaken in relation thereto.

Guidelines[16/] have been issued by the Agency which indicate that the acquisition of a property with a value in excess of $10 million is automatically deemed the acquisition of a business within the meaning of the Act. In determining whether properties having a value of less than $10 million are considered the acquisition of a business enterprise, various factors are to be considered, such as the nature of the building (e.g., whether it is residential, commercial, or industrial), the acquisition of other assets with the property, the existence of an office, the number of employees, etc.

The very nature of rental property tends to suggest that it is acquired for the purpose of making profits. In addition, the guidelines provide that if the rental property is acquired with other assets associated with the operation of a business, the rental property may constitute business property subject to review. Furthermore, if the purchaser ordinarily engages in speculating, developing, leasing or renting real estate, the purchase may be viewed as an acquisition of a Canadian business enterprise.[17/]

In practice, the Agency has followed the policy of exempting from the review requirements acquisitions of rental property in respect to which the activities of the foreign owners are strictly passive. Examples are a lease by the foreign owner on a net lease basis to persons who are eligible persons (not subject to review), namely individual Canadian residents or corporations controlled by individual Canadian residents. A foreign investor also may become exempt from the review process by structuring his ownership through a corporation, control of which is vested in eligible persons by the means of nonparticipating voting shares, with nonvoting participating shares retained by the nonresidents.

A nonresident purchaser of rural or raw land normally is exempt from FIRA if such a person merely purchases the land without developing it. However, such a person may encounter Provincial restrictions.[18/]

16/ Guidelines Concerning Real Estate Business, Canada Gazette Part I, Apr. 6, 1974.

17/ Hughes, Foreign Investment, Can. Encyl. Dig. (Ont.) Sec. 57 (3d ed.).

18/ Gauthier, Canada: Investment in Canadian Real Estate by Non-Resident Aliens, Tax Mgmt. Int'l J. 4-5 (Oct., 1977).

A noneligible person.--A noneligible person, who is subject to the review requirements, is defined in the Act as:

(1) An individual who is neither a Canadian citizen nor a landed immigrant;

(2) A foreign government or a political subdivision or an agency thereof; or

(3) A corporation, wherever it is incorporated, that is controlled in any way that results in control in fact (that is, directly through ownership of shares or indirectly through a trust, a contract, a holding company, or otherwise) by one of the persons or governments described in (1) or (2) or by a group of persons, any member of which is a person described in (1) or (2).

In general, if a company is controlled by noneligible persons, the company is itself a noneligible person. The Act contains several provisions which presume corporations to be noneligible persons unless the contrary is shown. For example, if 25 percent or more of the voting shares of a public company or 40 percent or more of the voting shares of a private company are owned by noneligible persons, the company is presumed to be a noneligible person. If 5 percent or more of any voting shares of any company are owned by any one individual noneligible person or any one foreign government or agency or by any one corporation incorporated outside of Canada, the corporation is presumed to be a noneligible person. These presumptions can be overcome.[19/] The Act also allows a person in doubt to apply for a ruling as to whether he is noneligible.[20/] A company of which more than 50 percent of the voting shares are owned by noneligible persons is conclusively deemed to be a noneligible person.

The acquisition of control.-- Control is acquired either by buying shares or a substantial portion of the Canadian assets. The Act makes rebuttable presumptions with respect to shares to the effect that the acquisition of the voting shares of a public company or 20 percent or more of the voting shares of a private company is considered to constitute the acquisition of control of any business conducted by the company. The Agency has taken the position that the sale of a 50-percent undivided interest in the assets of a real estate complex are subject to review because the acquisition is in law an acquisition of all assets but only to the extent of 50 percent thereof.

FIRA also applies to an indirect acquisition of control of a Canadian business enterprise. A business carried on by a corporation which is controlled in any manner that results in control in fact by another

19/ Golden, Real Estate Acquisitions under Foreign Investment Review Act of Canada, 10 Real Property, Probate and Trust J. 395, 398-99.
20/ Foreign Investment Review Act (FIRA), sec. 4(1).

corporation is considered to be carried on by the controlling corporation as well as by the corporation by which business is in fact operated. Therefore, if a U.S. entity buys the shares or assets of another U.S. entity, and the latter has either a Canadian subsidiary or assets in Canada, the Canadian aspect of the transaction is subject to review.21/

Application procedures.--Every noneligible person and every group of noneligible persons intending to acquire control of a Canadian business enterprise must give notice in writing to the Agency. The notice is an application available from the Agency, containing information about the applicant and the proposed investment. After an application is filed, the applicant may proceed to complete the investment without awaiting the decision on the application, but such a course of action is not recommended unless the sanctions discussed below will not apply. If the Agency does not act upon the application within 60 days from the issuance of the receipt of the application, the investment is deemed to be allowed. The Agency may interrupt the time limitation indefinitely by asking an applicant for more information. It has been reported that a delay of slightly over 3 months from the date of receipt to the date of allowance or disallowance has not been abnormal.22/

Another purpose of the Act and the application period is to give the Agency a chance to negotiate, if it wants, agreements with the investor.23/

Approval criteria.--Under the Act the Agency is required to recommend allowance or disallowance of any particular transaction to the Ministry of Industry, Trade and Commerce, which then makes a recommendation to the Canadian Cabinet. The Canadian Cabinet makes the final decision. The criterion used by the Agency and the Minister for their recommendations and by the Cabinet for its decision is whether the transaction "is or is likely to be of significant benefit to Canada."24/

Five factors must be considered as follows: (1) the effect the transaction will have on the level and nature of economic activity in Canada, including the effect on employment, resources, processing, utilization of parts and services produced in Canada, and on exports from Canada; (2) the extent and significance of participation of Canadians in the business; (3) the effect on productivity, industrial efficiency, technological development, product innovation, and product variety in Canada; (4) the effect on competition; and (5) the compatibility of the transaction with national, industrial and economic policy, including provincial policy objectives.

In making decisions on real estate investments, the Agency has accepted, in determining whether a real estate investment is beneficial to Canada,

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21/ Golden, supra note 16, at 399-400.
22/ Id. at 400-01.
23/ Id.
24/ Id.

the undertaking by the purchaser of the property to utilize the funds derived from the sale in a manner which is beneficial to Canada.[25]

Sanctions.--The Act authorizes tough sanctions for violations. The sanctions include the right to ask the court to render the investment nugatory, the power of divestment, application for injunctive relief, fines up to $10,000, and imprisonment for up to 6 months. These sanctions are applicable not to a vendor who sells property to a noneligible person, but to the noneligible person and in some instances the directors and officers of an offending corporation.[26]

Provincial restrictions.—On the provincial level, various types of restrictions on foreign investment in real estate exist and are highlighted below:

Foreigners investing in Ontario real estate encounter two pieces of restrictive legislation--a land speculation tax and a land transfer tax. Under the Land Speculation Tax Act, a tax of 20 percent is imposed on the increase in value of designated land after April 9, 1974, if the land is transferred after that date.[27] An additional 20-percent tax is imposed if control of a corporation owning the designated land can be exercised by a nonresident after disposition. Disposition under the Act includes the amalgamation or merger of corporations if 50 percent or more of the assets of any one corporation consist of designated land and if, as a result of the amalgamation or merger, control over the use of the designated land may be exercised by a different person or group of persons. However, a disposition of property does not include the transfer of property for the purpose only of securing a debt or loan or any transfer by a creditor to return property that has been used as security for a debt or loan or a transfer of property by means of which a change occurs in the legal ownership, but not in the beneficial ownership.[28]

A land transfer tax is imposed on every person who tenders for registration a deed conveying land situated in Ontario. A transfer of land embraces a lease of land for a period exceeding 50 years. The rate of tax is 3/10 of 1 percent of the value of the consideration up to the first $35,000 and 6/10 of 1 percent for amounts in excess of $35,000. However, for transfers to nonresidents the rate is 20 percent.[29]

Land under the Act[30] includes the land itself and buildings erected thereon. Hence, all acquisitions of rental properties by nonresidents

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25/ Id.

26/ Foreign Investment Review Act (FIRA), sec. 19-27; see also Golden, supra note 16, at 401-02.

27/ Land Speculation Tax Act, 1974 c. 17, sec. 2(1) (Ontario) (am. 1974, c. 107, sec. 1).

28/ 13 Canadian Encyclopedic Digest, Foreign Investment, sec. 174 (3rd ed.).

29/ Gauthier, supra note 18, at 6-7.

30/ Land Transfer Tax Act, 1974 (Ont.), c. 8, sec. 1(1)(d).

are subject to the 20 percent rate. A nonresident, for purposes of the Act, includes a Canadian resident who is neither a Canadian citizen nor lawfully admitted to Canada for permanent residence therein. In addition, a partnership, trust, or corporation is deemed to be a nonresident as soon as the 50-percent test referred to above is met. One individual nonresident shareholder holding 25 percent of the shares also is treated as having control.

The Act grants deferrals in two situations: unimproved land is developed by construction of buildings and the property is then sold and not held for rental purposes or improvements are limited to those required to permit construction by others on the land.[31/]

A land transfer tax in Quebec is levied at a rate of 33 percent on the value of the consideration paid for every transfer relating to land located in Quebec made after May 11, 1976, where the purchaser is a nonresident. A transfer is defined as any conveyance of land including the leasing of land for a period in excess of 40 years. Although the definition of land is broad and includes raw land and agricultural land, certain rental properties acquired are exempt from the Act. The Act also provides for deferred payments, exemptions, deemed transfers, and for a definition of a nonresident person.[32/]

Legislation precludes all nonresidents of Prince Edward Island from acquiring and holding real property of more than 10 acres in the province without permission of the Lieutenant Governor in Council.[33/] The constitutional validity of the law has been upheld.[34/]

In Alberta, temporary regulations have been promulgated prohibiting nonresidents from acquiring more than 20 acres of agricultural or recreational land in the province.[35/]

In Manitoba, a bill has been pending to limit nonresidents (corporations or individuals) to the ownership of 160 acres of farmland in Manitoba and resident nonfarmers to 640 acres.[36/]

Legislation passed in Saskatchewan in 1974 to safeguard farmland from foreign investors limits nonresident persons to an aggregate farmland holding with a value not in excess of $15,000, excluding buildings. Land is defined as farmland located outside a city, town, or village.[37/]

31/ *Id.* sec. 16.

32/ Gauthier, *supra* note 18, at 5-6.

33/ Real Property Act of Prince Edward Island, Sec. 3, 1951, c. 138, as amended by S.P.E.I. 1972, Ch. 40, Art. 1.

34/ Morgan et al v. Atty. Gen. for P.E.I., 42 D.L.R. 3d 603 (Can. 1976).

35/ Gauthier, *supra* note 18, at 7-8.

36/ *Id.*

37/ *Id.*

Currency restrictions.--No exchange controls exist in Canada on the flow of funds into or out of Canada.[38]

Taxation

Income taxes.--In Canada, income taxes are levied on individuals and corporations by both the Federal and Provincial governments.

Residents of Canada, both corporations and individuals, are taxed on their worldwide income. Nonresidents in general are subject to Canadian income taxes only on income derived in Canada and on capital gains realized on the disposition of taxable Canadian property.

Individuals are subject to tax according to a graduated rate schedule. In 1975, the top marginal rate of combined Federal and standard Provincial tax was approximately 61 percent, reached at about $70,000 of taxable income. The combined rates of Federal and Provincial corporation income tax were about 50 percent.

Income taxation.--Individuals are subject to tax at graduated rates. An individual may exclude up to $1,000 of interest income in computing taxable income. Income realized from the sale of an individual's home in most cases is exempt from tax.

Corporation taxation.--A corporation may deduct dividends it receives from another Canadian corporation or from a foreign affiliate. Certain dividends received are subject to special taxes. A special refundable tax of 33 1/3 percent is imposed on portfolio dividends received by private corporations. A nonrefundable tax of 25 percent applies to dividends out of the "designated" surplus of a controlled subsidiary. Dividends received from a "designated" surplus of a controlled subsidiary incur a nonrefundable tax of 25 percent.

Provisions allowing losses to be carried back and forward vary according to whether they are capital or noncapital.

Capital gains.--Since 1972, one-half of realized capital gains have been included in income and are subject to tax at ordinary rates.[39]

Taxation of nonresidents.--This section discusses the taxation of nonresidents in Canada under the Canadian Income Tax Act. Provisions which may apply pursuant to tax treaties are discussed below.

38/ Id.

39/ The above information on taxation is derived from Price Waterhouse, supra note 1, at 41-44.

Under the Canadian Income Tax Act, profits realized by a nonresident from carrying on business (e.g., conducting an active real estate investment) are subject to tax on the same net basis as is applicable to Canadian residents. If the income is realized from a passive real estate investment, nonresidents are taxed at a flat withholding rate of 25 percent on the gross amount of such income. In the latter case, a nonresident may elect on an annual basis to be taxed as if he or she is a resident of Canada.[40]

A nonresident transferring rental property in Canada is subject to Canadian income tax on one-half of the gain realized on the disposition, the same as a Canadian.[41] A disadvantage for nonresidents is that, unlike Canadian residents, they cannot spread their taxable income from a disposition through making an installment sale. Instead, their tax liability becomes due immediately.[42] Furthermore, abatement of Federal taxes, which applies to most provincial taxes, does not apply to the taxes imposed by Quebec and Ontario on capital gains realized by nonresidents. Therefore, double taxation may occur on the disposition of taxable property by a nonresident in these Provinces.[43] In addition, the Canadian income tax laws impose a capital gains tax on deemed dispositions, such as when an owner of real estate dies. However, some of the rollover provisions of the Canadian income tax law, applicable to a spouse or a spousal trust, do not apply to nonresidents.[44]

A nonresident alien engaging in development and selling activities in Canada, such as realizing rental income from real estate during development or predevelopment stages and taxable capital gains from the sale of the real estate, is subject to income tax at the ordinary rate of income tax. However, use of the U.S.-Canadian tax treaty in these situations may be advantageous.

Immovable property located in Canada and owned by nonresidents is subject in all cases to duties upon the death of the owner.[45] Canadian federal estate and gift taxes have been repealed.

U.S.-Canadian tax treaty.[46]--Under the U.S.-Canada Income Tax Convention, passive rental income realized by a U.S. national or company is subject to a withholding tax of no more than 15 percent on the gross amount of such income, provided the U.S. national or company does not have a permanent establishment. It appears that under the treaty active rental income is taxed on a net basis as per the rules and rates applicable to Canadian residents.[47]

40/ Gauthier, *supra* note 18, at 9-10.
41/ Canadian Income Tax Act, para. 2(3)(c).
42/ Gauthier, *supra* note 18, at 13.
43/ *Id.*
44/ Income Tax Act, Sec. 70(6).
45/ Gauthier, *supra* note 18, at 17-18.
46/ U.S.-Canada Tax Treaty, 6 CCH Standard Federal Tax Reporter.
47/ *Id.* Art. II.

The treaty provides that gain derived in Canada from the sale or exchange of capital assets by a resident or a corporation or other entity of the United States shall be exempt from taxation in Canada, provided such resident or corporation or other entity does not have a permanent establishment in Canada.48/ Hence, a U.S. entity should be able to qualify for an exemption on either the direct sale of real property or the sale of stock in a Canadian entity holding real property. However, the Canadian Department of Inland Revenue has taken this position: If a U.S. entity owns Canadian rental property which is considered a business undertaking, a permanent establishment exists within the meaning of the Protocol49/ to the Convention, with the result that the sale of real estate is not exempt. Therefore, a U.S. person will minimize tax liabilities in Canada by structuring his or her ownership and operation of the property in such a way as to have a passive property investment rather than conducting a business.50/

The treaty provides further that corporations organized under the laws of the United States, more than 50 percent of the outstanding stock of which is owned, directly or indirectly, throughout the last half of the taxable year by individual residents of the United States, are exempt from any taxes imposed by the United States with respect to accumulated or undistributed earnings, profits, income, or surplus of such corporations.51/

Convention on the tenure and disposition of real and personal property.52/--The Convention signed between the United States and the United Kingdom in 1899 applies between the United States and Canada. It is discussed in the section on the United Kingdom.

48/ *Id.* Art. VIII.

49/ *Id.*, Protocol 3(f) of the Convention.

50/ Gauthier, *supra* note 18, at 15.

51/ *Id.* Art. XIII(2).

52/ Convention on the Tenure and Disposition of Real and Personal Property, March 2, 1899, U.S.-Canada, 31 Stat. 1939, T.S. No. 146.

Introduction to the French Legal System

The French legal system is based on the Code system, particularly the Napoleonic Civil Code of 1803. Much of the legislation governing foreign investment, however, has been enacted recently by Parliament and as result of executive decrees.1/

In October 1958, the French Government proclaimed the Fifth Republic and a new constitution was introduced that limited the power of Parliament and strengthened the Executive.

Climate and Laws Governing Real Property

The real estate profession and its operation.--In France, a national organization, the French Confederation of Real Estate Professionals (Confederation Francaise des Professions Immobilieres-CFPI), represents the interests of its three component organizations. They are: (1) Confederation of Real Estate Managers and Managers of Cooperative Properties (Confederation Nationale des Administrateurs de Biens Syndics de Copropriete de France-CNAB), whose membership is engaged primarily in the management of buildings; (2) Federation of Agents of Real Estate and Business Opportunities (Federation Nationale des Agents Immobilieres et Mandataires en Fonds de Commerce-FNAIM), whose membership is engaged primarily in brokerage services; and (3) National Federation of Developers (Federation Nationale des Promoteurs-Constructeurs-FNPC), whose membership is engaged primarily in land development projects, such as residential, commercial and/or industrial projects. To belong to each of these organizations, a person must be a principal in the business--the owner, or a major stockholder, and must fulfill personal requirements, such as a record free of criminal activity or bankruptcy. In addition, an applicant must demonstrate in an examination a certain level of knowledge of the real estate profession and allow inspection of his or her books of record.

Each of the three organizations has a group policy of errors and omissions insurance, with all members being required to participate for the protection of clients as well as members. In addition, each organization maintains on behalf of all of its members an insurance policy, required by law, to provide for compensation to clients for damages which may result from dishonest acts of members. Each member must regularly pay a premium to a Societe de Caution Mutuelle, another type of liability insurance.

1/ For an introduction to the French legal system, see deVries, Civil Law and the Anglo-American Lawyer (1976); F. H. Lawson, A. E. Anton & L. N. Brown, Amos & Waltons Introduction to French Law (1966) [hereinafter cited as Lawson].

Since 1973, persons wanting to engage in real estate are required to pass a nationwide examination, obtain a license, and participate either in a mutual security society or the guarantee fund of an organization.

In the smaller cities, real estate offices conduct a general practice. Only in the major cities do real estate offices specialize.

Real estate agents are compensated by commission, usually payable by the seller, although in some regions, it is customary to divide the payment of the commission between buyer and seller.

Commission rates usually are set by edict of the Prefect. In the provinces, the rate is 5 percent, both for brokerage and management, although variations appear. In Paris, the rates are 7 percent on sales of property, 8 percent on suburban property, and 10 percent on business opportunities. Varying rates apply to residential rentals and to management fees for rental property according to the number of rental units and the amount of rent per unit.[2/]

Financing institutions and practices.--In France, there are three large commercial banks, the Societe Generale, Credit Lyonnais, and Banque Nationale de Paris. They are all nationalized and account for about 50 percent of the commercial banking business. Many of the approximately 260 commercial banks are wholly or partially owned by national, provincial, or local governments, including the nationwide Credit Agricole and Credit Populaire.[3/] Several other institutions serve as sources of real estate credit.

Establissements Financiers exist in various areas. They are owned by other financial institutions from which they receive their funds for mortgage lending.

Caisse des Depots et de Consignations loan primarily to municipalities for low-rent housing, and also for private construction and sale of "working-class dwellings," and on 20-year or longer terms. They obtain funds from savings deposits of the national postal savings system and by savings banks that usually are sponsored by a government department or a community.

Building and loan associations (Epargne Logement) make housing loans to their depositor-members.

Investment-trust-type institutions (Banques d'Affaires and Societes d'Investissements) put equity as well as debt investments on real estate projects. Their funds are derived primarily from employee pension plans, a portion of such funds which must by law be invested in mortgages.

2/ All of the foregoing information on the real estate profession in France is derived from E. Cosner, Real Estate--European Style 162-66 (1976).

3/ Id. at 157.

Privately and publicly owned insurance companies make loans on large real estate projects.

Large estates, which are administered by notaries, also can serve as a source of mortgage loans.

Loans for apartments and homes in the luxury class are made for 50 to 80 percent of the appraised value, for periods of 10 years to a maximum of 20 years, with repayments due at 3- or 6-month intervals. Secondary mortgage loans also can be obtained from the Caisse des Depots et des Consignations up to 90 percent with repayment terms of 5 to 7 years.[4/]

Residential mortgage policies are established by the Credit Foncier de France, a state organization operated under the direction of the Minister of Finance. Its principal source of funds is from issuing bond units according to size and cost restrictions and limitations on family incomes; in the case of low-income families, with 50-percent loans for periods up to 25 years. Other families finance housing units in the private market, although usually pursuant to limitations agreed upon between the banks and Credit Foncier. Private housing loans, made for up to 80 percent of value, often are rediscounted by the bank with the Credit Foncier. Hence, the Credit Foncier either directly or indirectly determines and sets standards for much of the residential construction and financing.

Housing developments are financed by the land developer. The latter uses his own funds, loans from financial institutions, and/or advances by buyers during construction.[5/]

Leases.--Ordinarily, leases of more than 1 year have an escalator clause based on the cost of living index and providing for adjustment of the rent annually. Tenants can terminate leases of more than 3 years at any triennial interval by giving 3 months' notice in advance.

Due to longstanding rent controls, the level of rents in buildings under rent control are far below the market. Therefore, before a lease commences, a tenant usually pays "key money," which is a payment made to an existing tenant to compensate him or her for the difference between the controlled rate and the market. "Key money" customarily is paid both in apartments and in commercial buildings.[6/]

The law of immovable property.--The French Civil Code distinguishes between immovables, which are analogous to real property in the Anglo-American legal system, and movables, which are analogous to personal property. Real property includes: (1) property immovable by nature, such as land and buildings or structures thereon; (2) immovables, such as fixtures, animals required for cultivation, and machines or installations indispensable for factories or commercial premises; and (3) types

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4/ Id. at 169.
5/ Id. at 168.
6/ Id. at 166.

of interest traditionally classified as immovables, such as usufruct, servitude, mortgage, and certain privileges (liens).

Usufructs are similar to a life estate in Anglo-American law. A usufruct grants to one person the right to use and enjoy property while another person holds bare title. A usufruct can be created by a contract of gift or sale or by operation of law, such as by the rights given to a surviving spouse. A person enjoying a usufruct has personal use of property, receiving all income and exercising full administration, although he or she may not alienate or mortgage property. He or she must not commit waste to the usufruct property and may be required to post bond for this purpose. A usufruct usually is established for life, but it can be created for a fixed term, such as a number of years.[7/]

The land register office and its procedures.--The Register of Real Estate Mortgages (Bureau de la Conservation des Hypotheques) is a register in which all events affecting title must be recorded, such as deeds of sale, mortgages, transfers by testate or intestate succession, tenancies in common, long-term leases, and contractual servitudes. Every commune and arrondissement in France has a register. A separate dossier is maintained for each tract (fichier immobilier).

Documents concerning real property which are recordable have priority not by date of transaction, but by date of registration. To preserve their priority against bona fide purchasers, the registration of mortgages must be renewed every 10 years. The seller has a 2-month grace period in which to register his lien for the unpaid purchase price. Only after the grace period does it lose its priority to mortgages previously recorded.

Sale and transfer of real estate.--An agreement to sell (promesse de vente) is drafted for real estate transactions. Standard forms of agreement are not used. Instead, each transaction is set forth in an individually written agreement. In practice, the parties, once they reach an oral agreement, go to a notary, who is selected by one or both of the parties or by the agent, to draft the final form of the agreement.[8/] The notary is a public official and he acts for both parties, or "between the parties," since he is regarded as an independent state official.[9/]

The agreement to sell will contain a physical description of the property and a reference to the cadastre. The agreement also has the origine de propriete, a condensed, although often lengthy, abstract of

7/ 7 Martindale-Hubbell Law Directory 3569 (1979); Lawson, supra note 1, at 87-136.

8/ Cosner, supra note 2, at 167; Lawson, supra note 1, at 104-9.

9/ Thirlway, Conveyancing and Conveyancing Costs in France, 3 Solicitor's Journal 204, 205 (March 17, 1967).

the title history for the last 30 years. The agreement also sets forth les conditions ordinaires et de droit, which invoke the standard conditions implied by the civil code. The price of purchase is set forth, and it is stated whether it is to be all paid on completion (paye comptant) or whether some of it must be paid in further installments. All easements known to the vendor are revealed in the agreement. In addition, the result of the enquiry made by the local office of the Ministere de la Construction with respect to planning matters is included in the agreement, and the certificate (Certificat d'Urbanisme) by this body is ordinarily attached to the notarial deed of sale.10/ In the event the certificate indicates the building not to be in habitable condition or to have structural defects, an Arrete Prefectoral is placed in the record. If this occurs, the title can still be transferred, but the buyer will bear the danger of future costs and possible payment of damages in the case of accident on the premises if the cited condition is not corrected.11/

The real estate transaction can be closed by the notary when the latter receives from the buyer the necessary funds and the notary pays them to the seller, either after actual registration is complete or upon the notary giving an oral report of the condition of title, subject to the completion of registration.

The notary receives compensation for his or her services paid by the buyer or by agreement. The fee schedule starts at 4.5 percent of the first 9,000 francs of value of the property and successively diminishes to 0.75 percent of the value over 60,000 francs.12/

Selected regulations concerning real estate: price controls and building restrictions.--Many older buildings in France are subject to rent control, with "key money" paid upon the transfer of tenancy to compensate for the difference between actual and market rents. However, buildings constructed without government subsidy since 1948 and older buildings in the higher rent categories do not have rent ceilings.13/

Construction must comply with a national building code, which is administered and enforced locally. To obtain a building permit, the applicant submits his plans to the departmental director in the local community, who must approve them and forward them to the office of the Ministere de l'Equipment et du Logement. In addition, plans for any major construction--industrial, commercial, or residential--must clear the office of the Prefect.14/

Family law and rights in real property.--A reform of French family law was made in 1965 and expands the rights of married women. The marital

10/ Id.
11/ Cosner, supra note 2, at 167.
12/ Id.
13/ Id. at 170.
14/ Id. at 172.

property regime is established either by law, if the spouses are married without a contract, or by a notarial contract.

Marriages which took place before February 1, 1966, without contract are governed by community property regime of the former law. However, administration of property is governed by the provisions of the new law. French community property law is complex. Basically, the husband alone is responsible for the management of the property, but has no right or power to manage the wife's separate assets. The husband does not have the authority, without the wife's prior consent, to give away any asset of the community. The husband cannot sell, mortgage, or transfer rights in real property belonging to the community. The husband cannot alienate property rights where transfer must be published according to law, nor can he enter into leases of commercial or agricultural property of the community. The husband can dispose by will only of his share in the community.[15]

Descent and Distribution

Intestate succession.--The order of intestate succession is as follows:

(1) The surviving spouse has a right of usufruct of: one-fourth of the estate, if the decedent leaves one or more children; one-half if the decedent leaves brothers or sisters, descendants of brothers or sisters, or illegitimate children conceived during marriage.

(2) Legitimate and illegitimate lawfully acknowledged children and descendants thereof take the entire estate *per stirpes* by representation, subject to the right of usufruct of the surviving spouse.

(3) If there are no children or descendants of the surviving spouse, the parents and brothers and sisters or their descendants succeed, with one-fourth to each parent and one-half to be divided among the brothers and sisters.

(4) If there are no children or descendants of the decedent, and no brothers and sisters or their descendants, the ascendants succeed to the estate, and the estate is divided into two equal parts, one for the paternal line and one for the maternal line.

French law governs all real property situated in France, regardless of the fact that the decedent may have been a U. S. national or that the place of death may have been the United States.[16]

15/ 7 *Martindale-Hubbell Law Directory*, 3555 (1979).
16/ *Id*. at 3550-51; Lawson, *supra* note 1, at 288-316.

Forced heirship.--In France, the reserve portion of a person's property cannot be given away, either by transfer inter vivos or by will. The reserve portion is one-half of a person's property, if the latter leaves one child; if the person leaves two children, he or she can give away one-third; if he or she leaves three or more, he or she can give away only one-fourth of the property. If there are no ascendants or descendants, there is no reserve. Properties disposed of in violation of these rules are valid, but they can be reduced to the legally permissible amount.

Real property situated in France is governed by the lex res sitae. Therefore, a disposition of the French real estate by a U.S. resident must take into account French law concerning the reserve.[17/]

Wills.--Three types of wills are recognized under French law: (1) holographic; (2) notarial; and (3) mystic.

French citizens who are abroad may make holographic wills or wills in accordance with the form prescribed by the law of the place where the will is made.

If wills are made by an alien in France, they must be made in accordance with French law or with the national law of the alien.

Although real property located in France is subject to French law, an alien residing abroad may dispose of the same by will made in accordance with the form prescribed by the law of the place where it was drawn. However, a will must be registered in France at the place where the property is situated, and at the place where the decedent had his or her last or last known domicile in France.[18/]

France ratified, on December 24, 1967, the Hague Convention on Conflicts of Law Relating to the Form of Testamentary Dispositions. The United States is not a signatory.

Other Municipal Laws Relevant to Foreign Investment in Real Estate

Forms of business enterprise.--The most widely used types of commercial entities in France are the branch, the corporation (societe anonyme) and the private limited company. Many other forms of business organization recognized by the French include the following:

A sole proprietorship (enterprise individuelle) is managed under the sole responsibility of an individual who is personally liable for business debts to the extent of all his or her business and personal assets.

17/ 7 Martindale-Hubbell Law Directory 3553 (1979); Lawson, supra note 1, at 333-38.

18/ 7 Martindale-Hubbell Law Directory 3576 (1979); Lawson, supra note 1, at 317-30.

A civil company (<u>societe civil</u>) is a partnership organized under civil law rather than the commercial code. These entities are not allowed to undertake commercial activities, and their use is therefore limited to the real property, agricultural, and other sectors. Their use in the real property sector varies and includes the ownership and construction of real estate.

In a general partnership (<u>societe en nom collectif</u>), the partners are jointly and severally liable on all their assets, both business and private. All partners are managers (<u>gerants</u>) unless otherwise stipulated.

A limited partnership (<u>societe en commandite simple</u>) and a limited partnership with shares (<u>societe en commandite par actions</u>) are seldom used today. In these entities, at least one partner must have unlimited liability. The "limited" partners in the first type or the shareholders in the second must be silent partners who may not participate in the management of the business.

Special-purpose companies exist and are used for certain real estate activities. They take one of the above-mentioned forms, but are subject to specific legal, tax, and special regulations. They include real estate leasing companies (<u>societes immobiliers pour le commerce et l'industrie</u>-SICOMIS) and real estate investment companies (<u>societes immobiliers d'investissement</u>-SIIS).[19]

<u>Commercial register</u>.--All persons or companies, domestic or foreign, which are engaged in commercial activities in France, either directly or through the intermediary of a branch or an agent, or in any manner, must register in the Register of Commerce within 2 months after their installation. Upon registry, the person or commercial entity is given a registration number, which must appear on all commercial documents as well as on stationery.[20]

Laws Applicable Primarily to Foreign Investors

<u>Laws on foreign investment</u>.--Prior to making a direct investment in France, an application for authorization must be filed with the French Treasury Department, which in turn decides whether the proposed investment is approved, postponed, or rejected.

The regulations define direct investments as:

(1) The purchase, creation, or extension of businesses, branches, or any personal enterprise; and

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19/ Price Waterhouse, Doing Business in France 33-35 (1965); Lawson, <u>supra</u> note 1, at 345-55.

20/ 7 <u>Martindale-Hubbell Law Directory</u> 3570 (1979); Lawson, <u>supra</u> note 1, at 342.

(2) Any other transactions which by themselves or with other simultaneous or successive transactions result in having one or several persons;

(3) Take over or increase their control of a company having an industrial, agricultural, commercial, financial, or real estate activity; or

(4) Expand such a company already controlled by them.

Direct investments which require authorization.—If a U.S. person wants to create a business, permanent establishment or personal enterprise in France, prior authorization for the investment may be required from the French Treasury Department. If the proposal is to acquire an existing French company or enterprise, a distinction is made between quoted and nonquoted companies.

With respect to companies quoted on the French stock exchange, control was traditionally considered as having occurred when at least 20 percent of share capital was acquired. Since May 1972, the French Government has expanded the criteria used in determining whether foreign control of a French-quoted company exists to include also the existence of license, technical assistance, loan guarantee, and other collateral contractual arrangements between the parties.

With respect to nonquoted companies, the determination of control is made primarily by weighing equity ownership of foreigners against the shareholdings of other owners. Therefore, control by a foreign company may be reached at 20 or 30 percent, depending on the percentage of equity ownership of the other shareholders.[21]

No prior authorization generally is required for a nonresident person who purchases real estate through a notary. Authorization is not needed if the entire purchase price is paid in cash and if the transaction is made by the transfer of foreign currency or the debiting of a nonresident account in France.[22]

Liberalizations under the 1974 decree.—A 1974 decree eliminated the requirement to obtain prior authorization by direct foreign investments. The following direct foreign investments do not need prior authorization, provided that these investments do not exceed 2 million francs during any calendar year:

(1) Capital of a French company is increased by its nonresident shareholders, provided two conditions are fulfilled: the increase does not

21/ Price Waterhouse, supra note 19, at 7.

22/ Library of Congress, Survey of Restrictions that Nations Place on Landownership by Nonresidents, in Staff of Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Foreign Investment in Agricultural Land 219 (Comm. Print 1979).

raise the percentage of capital stock held by the nonresident shareholders; and the increase is paid for with foreign money or is withdrawn from an existing nonresident French bank account.

(2) Capital or funds given to an entity created by a nonresident are increased, provided that this increase is wholly financed by foreign money or is withdrawn from a nonresident French bank account.

(3) Loans are made by foreign controlled French companies or enterprises of the same group, provided the following conditions are satisfied:

(i) The amount of the loan must be made in foreign money or withdrawn from an existing nonresident account;

(ii) The terms and conditions of the loan must provide that a period of at least 1 year separates each reimbursement payment. Any advance reimbursement of the loan must have the prior approval of the French Government;

(iii) The interest rate may not be greater than the market rate; and

(iv) The original loan agreement or a photocopy or duly certified copy, translated into French, must be filed with an approved bank. (The agreement must set forth the identity of the contracting parties, the amount loaned, the type of foreign money to be used, the reimbursement periods, the reasons for the loan, the security and/or guarantees made by the borrower, and all other relevant information.)

(4) Guarantees made by nonresidents to their controlled French companies or by nonresidents of the same group, provided that these guarantees are in foreign currency.

The 1974 Decree also eliminates the prior authorization requirement for increases in the capital of French companies by nonresident shareholders through capitalization of nondistributed profits. For all the transactions which do not require prior authorization, the underlying documents and a report must be filed with the Treasury Department or for French real estate with the Bank of France not later than 20 days after the transaction is completed.[23/]

Application procedure and general criteria for acceptability.--A prospective foreign investor must file the investment application with the Treasury Department. It is reviewed by a committee composed of the representatives of different ministries and administrations, particularly the Ministries of Finance, Defense, Agriculture, Industrial and Scientific Development, Public Health, Home Office, the Bank of France, the regional development agency, DATAR, and Planning. The committee meets bimonthly. Applications concerning the acquisition of leading French industries and businesses often are considered independently by the Ministry of Finance.

23/ Price Waterhouse, *supra* note 19, at 8-9.

The Ministry of Finance, in examining direct investments requiring approval, has announced the following general criteria for acceptability:

(1) From an economic perspective, an investment is evaluated according to its potential contribution in the creation of jobs, the introduction of new technology, the development of exports, and the reestablishment of declining industries.

(2) From a financial perspective, an investment is evaluated according to its prospects for profitability, the equilibrium of its financing, and the requirements engendered by the international and domestic monetary situation.[24/]

Currency restrictions.—All payments between France and abroad as well as foreign currency transactions within France must receive the prior approval of the Ministry of Finance. All payments must be made through approved banks, although the latter have general authorization to make normal and current payments to meet approved expenses, provided that they are furnished a copy of the underlying agreement.

For their first 2 years of residence, foreigners may hold freely convertible franc accounts. After this period, they become residents for exchange control purposes.[25/]

Internal and external financing.--Since January, 1974, foreign-source-loan-financing of the initial working capital and start-up experience of foreign direct investments in France has been required, provided that such loans bear a reasonable and balanced relationship to the total capital.

After the commencement of operations, if additional financing is needed, another investment application may be required. It is expected that foreign-controlled French companies will finance their operations, other than license or agency agreements, from both French and foreign money markets. Since 1974, the Ministry of Finance has been requiring foreign-controlled companies to finance at least 50 percent of their operations on a foreign money market in accordance with a formula that takes into consideration the French company's capital, income, reserves, and loans.

With certain exceptions, borrowing by French residents, French companies, French branches of foreign companies from international companies, and foreign residents must have the prior approval of the Treasury Department. In general, guarantees made by nonresidents, either directly or indirectly through group affiliates, to controlled French companies or branches are direct investments requiring the prior authorization of the Treasury Department.[26/]

24/ Id. at 9.
25/ Id. at 6.
26/ Id. at 11-12.

Taxation

Corporate income tax.--In addition to French entities which are subject to corporate income tax, branches of foreign companies are liable to French corporate taxation.

Dividends paid by French companies to French residents also are subject to a reduced rate of taxation, with shareholders who are French residents or French companies receiving a tax credit (avoir fiscal) of 50 percent of the dividend paid to them.

Dividends paid by French companies to nonresident shareholders and the net after-tax profits of French permanent establishments of foreign companies are subject to a withholding tax, at the rate of 25 percent or a reduced tax treaty rate. An equalization tax (pre-compte mobilier) also is imposed on dividends paid by French companies out of profits which have not been assessed the full corporate income tax or which have not been distributed within a 5-year period.[27/]

Capital gains.--Since 1965, a distribution has been made between short- and long-term capital gains.

Short-term capital gains are defined as gains on the sale of fixed assets held for less than 2 years; and that portion of the gains on the sale of fixed assets held for 2 years or more which corresponds to depreciation previously deducted from taxable income, such as recaptured depreciation. Short-term capital gains and losses must be netted for tax purposes. If the net for the year is gain, it is taxable at 50 percent. However, the company may elect to spread the payment of the related tax over 3 years. If the net is a loss, it is either deductible from the profits, or, if there is an operating loss, the net short-term capital loss is added to the operating loss and the total can be carried forward for 5 years.

Long-term capital gains are gains from the sale of nondepreciable fixed assets, such as land and leaseholds held for 2 years, depreciable fixed assets, and securities. Long-term capital gains and losses of a taxable year must be netted. If the net is a gain, it can be used to offset prior long-term capital losses carried forward from the preceding 10 years or to absorb operating losses. Once absorbed, operating losses may not be deducted subsequently from profits taxable at 50 percent. Only remaining long-term capital gain is taxed at 15 percent, and the net after-tax gain is credited to a special reserve.[28/]

With respect to fiscal years closed after June 30, 1974, the net amount of long-term capital gains recognized by enterprises subject to corporate

27/ Id. at 28.

28/ Id. at 80-82. See also J.F. Chown & M. Edwards-Ker, The Acquisition of Assets, Companies and Real Estate in Belgium, France, Germany, the Netherlands, and the U.K. 62-63 (1974).

income tax or personal income tax arising from the conveyance of building land (terrains a batir) is taxed at the rate of 25 percent. Building land is defined as unimproved, nonagricultural land and land with buildings of a nominal value or destined to be demolished. For capital gains resulting from the sale of such land, it is no longer possible to offset long-term capital gains attributable to building land against other long-term capital gains. It is necessary, therefore, to segregate these two types of gain. The net amount of the capital gain must be credited to a special long-term gain reserve which must be created to clearly identify the gains attributable to building land.[29]

Taxation of certain real estate activities.--Housing construction profits derived either directly or through housing construction enterprises (societes de construction-vente) have been taxed under a favorable regime since 1971. To qualify as a "housing construction enterprise," a company subject to corporate income tax which constructs or subcontracts the construction of buildings for its own account must have as its sole corporate purpose the construction of buildings of which at least three-fourths of the total floor surface is devoted to dwellings. The profits of a qualifying enterprise are subject to the following tax treatment:

(1) The first 30 percent of the profits are subject to 50-percent corporate income tax and the net after-tax profits may be distributed immediately.

(2) The remaining 70 percent of the profits are allocated to a special reserve and are taxable as follows according to when they are distributed:

(i) If they are distributed after 7 years, no corporate income tax is payable, although the distribution will be subject to the equalization tax (precompte), and the shareholder may receive a corresponding tax credit (avoir fiscal).

(ii) If they are distributed after more than 4 but less than 7 years, half of the amount so distributed is subject to 50-percent corporate income tax. Equalization tax also is charged. Shareholders may obtain a tax credit. The effective tax rate is 32.5 percent.

(iii) If they are distributed in less than 4 years, the entire amount distributed is subject to 50-percent corporate income tax and a later payment interest penalty of 9 percent annually discounted from the year in which the profit was earned.

The receipt of rents can be structured in different ways:

(1) A societes civiles immobilieres (SCI) is a real property civil company. It must have as its sole purpose the management of real property and must have as its sole activity the rental of unfurnished dwellings, nonequipped commercial or industrial offices and buldings,

29/ Price Waterhouse, supra note 19, at 82-83.

or unoccupied land. Unless an election is made, an SCI is not taxable. Instead, shareholders who are subject to corporate income tax are taxed at a rate of 50 percent.

(2) A societes anonymes immobilieres (SAI) is required to have as its sole purpose the management of real property, and is subject to corporate income tax at the rate of 50 percent, with dividends distributed abroad subject to withholding tax.

(3) A societes immobilieres pour le commerce et l'industrie (SICOMI) must have the form of an SA or SARL, with its sole corporate purpose being the leasing of unfurnished premises for business use. The minimum capital required is F25 million, which must be fully paid up. An SICOMI is not taxable, provided 85 percent of its net profits are distributed annually. Shareholders are taxable on dividends distributed, and foreign shareholders incur dividend withholding tax. Since July, 1975, the Ministry of Finance has not permitted foreigners (individuals or companies) to own more than 50 percent of the shares of a SICOMI.

(4) A societes immobilieres d'investissement (SII) is a real property investment company that must take the form of an SA and have as its sole purpose the exploitation of buildings on which at least three-fourths of the total surface area is used as dwellings. The minimum capital is F50 million, and it must be fully paid up. An SII is not taxable, but its shareholders are subject to corporate or personal income tax on profits. Dividends paid to foreign shareholders are not subject to withholding tax.[30/]

The purchase of land and of buildings to be demolished, for constructing new buildings, is subject to value-added tax at the intermediate rate of 17.60 percent, provided the purchaser agrees in the sales deed to start construction within 4 years. The Ministry of Finance may extend the 4-year period. If the purchaser does not agree to start construction within 4 years, the purchase is subject to a registration tax of 16.60 percent on the sales price of the land.[31/]

Individual income taxation.--Individuals are liable for French personal income tax if they have an habitual residence in France, income from French sources even though they have no residence in France and income which is taxable in France pursuant to an applicable tax treaty.

Gain realized from the sale of a principal French residence is not subject to tax unless the tax authorities can prove speculative intent. Gains and losses from the sale of real estate held as an investment are, however, subject to tax, as discussed above.[32/]

30/ Id. at 100-103. For an excellent discussion of structuring considerations with respect to entities engaging in real estate activities, see Chown & Edwardes-Ker, supra note 28, at 63-67.

31/ Price Waterhouse, supra note 19, at 67-69; Chown & Edwardes-Ker, supra note 28, at 67-68.

32/ Price Waterhouse, supra note 19, at 118-23.

Other taxes on real estate.--In general, all premises which are not used for business or professional pursuits are liable to a dwelling tax (contribution mobiliere) based on rental value, payable even if the occupant quits the rented dwelling during the year.33/

Owners of all French real estate are subject to this tax (contribution fonciere), including owners of undeveloped land, buildings, machinery and equipment.34/

International Agreements

Convention of establishment between the United States and France.35/--The Convention grants to U.S. nationals and companies in France national treatment with respect to leasing, utilizing, and occupying real property of all kinds appropriate to the exercise of the rights accorded them elsewhere in the treaty. Hence, the right of U.S. persons to lease land is linked to their exercising of other treaty rights and is not a right by itself.36/

U.S. nationals and companies have, with respect to the acquisition and possession of real property, all the rights to which aliens and alien companies are entitled in France, and France has the right to invoke reciprocity in their respect. Hence, U.S. persons have the right to neither national nor most-favored-nation treatment. Furthermore, France can grant rights which it does give to U.S. persons only in exchange for reciprocal rights for French persons who may want to acquire and possess land in the United States.37/ In exercising the right to invoke reciprocity, the French Government can take into account the treatment accorded French nationals and companies in a State, territory, or possession in which U.S. persons wanting to acquire French land are domiciled.38/

The Convention gives France the right to determine the extent to which aliens, including U.S. persons, can "exploit the soil or other natural resources in France."39/ In addition, under the Convention, France has the right to take measures regarding fissionable materials, the radioactive byproduct of the utilization or manufacture of materials, or raw materials which are the source of fissionable materials.

U.S. nationals and companies have a right to be accorded within France national treatment with respect to leasing, acquiring, and possessing personal property of every kind, except ships.40/

33/ Id. at 141.
34/ Id.
35/ Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625.
36/ Id. Art. VII.
37/ Id.
38/ Id. para. 10, Protocol to the Convention.
39/ Id. Art. V(2).
40/ Id. Art. VII(2).

U.S. nationals and companies have a right to national treatment with respect to engaging in all types of activities for gain within France, whether directly or through an agent or another person. These nationals and companies can also: establish and maintain branches, agencies, offices, factories, and other establishments appropriate to the conduct of their business; organize companies in France and acquire majority interest in French companies; and control and manage the enterprises which they have established or acquired. In addition, the enterprises controlled by U.S. persons have a right to national treatment in all that relates to the conduct of their activities.[41]

The property of U.S. nationals and companies cannot be expropriated in France except for a public purpose and with payment of just compensation. Such compensation must be the equivalent of the property taken, and it must be paid in an effectively realizable form and without needless delay.[42]

A right to national treatment in being subject to internal taxation in France applies, inter alia, to: U.S. nationals and companies residing in France; U.S. nationals not residing in France, but engaged in trade or other gainful pursuit in France (whether through a permanent establishment or a fixed place of business); and U.S. companies engaged in trade or other gainful pursuit in France.[43]

U.S.-French treaty for the avoidance of double taxation.[44]--Under the U.S.-French double taxation treaty, income earned by U.S. persons from real property and royalties via the operation of mines, quarries, or other natural resources is taxable only in France.[45] However, gains realized by U.S. persons from the sale of capital assets, other than real property, in France are taxable in the country of the residence of the owner.[46]

Under the treaty, the rate of withholding tax on dividends received by a U.S. parent corporation from a French subsidiary is 5 percent, making the effective rate of French taxation on dividends 52.5 percent.[47] The withholding tax imposed on a U.S. corporation with a branch in France is limited to 10 percent of the net profit remaining after a corporate profits tax of 50 percent is imposed, making an effective rate on the distributed income of 55 percent.[48]

41/ Id. Art. V.
42/ Id. Art. IV.
43/ Id. Art. IX.
44/ Convention on Double Taxation, July 28, 1967, 19 U.S.T. 5280, T.I.A.S. No. 6518.
45/ Id. Art. V, para. 1.
46/ Id. Art. XII.
47/ Id. Art. IX.
48/ Id. Art. XIII.

Withholding tax in France on interest paid to U.S. persons on bonds, notes, debentures, or any other form of indebtedness is limited to 10 percent.[49/] Withholding tax in France on royalties paid for the use of patents, trademarks, and know-how as well as on gains from the sale of such property is limited to 5 percent.[50/]

France and the United States also have signed and ratified an estate tax treaty, which went into effect October 17, 1949.

49/ *Id.* Art. X.
50/ *Id.* Art. XI.

Germany

Introduction to the Legal System of Germany

The German legal system, as with all European continental legal systems, is derived from the Roman law as it was developed during the Middle Ages. Contrary to Anglo-American law, no distinctions are made in German law between common law and equity and between case law and statutory law.

Only two sources of law exist in Germany: statute (Gesetz) and custom (Gewohnheitsrecht). Although most of the important fields of law have been codified, the statute need not be part of a code. The codes are supplemented by numerous statutes which cover a narrower field of law. In the broad sense, Gesetz is any legal rule that has been enacted and promulgated by those state authorities who are constitutionally entitled to enact and promulgate laws. Unlike the Anglo-American legal system, decisions of the courts are not binding, with certain statutory exceptions on the parties, and case decisions do not have a binding force of precedent.[1]

A fundamental distinction of German law is made between public and private law. Private law is made up of the civil law which includes the law of contracts, torts, real and personal property, domestic relations and succession, the commercial law, etc. Public law is composed of, *inter alia*, criminal law, administrative law, and constitutional law.[2]

Climate and Law Governing Real Estate Investments

The climate in which real estate transactions are made provides an overview of essential, albeit nonlegal, considerations which govern real estate investments. They are classified into the following categories: the real estate profession and its operation; financing institutions and practices; and construction and construction costs.

The real estate profession and its operation.--Two principal organizations of real estate professionals exist. One, the Bundesverband Ring Dentscher Maklev (RDB), has functioned since 1925. It has about 3,300 members engaged in various types of real estate activity. Another organization, Verband Dentscher-Maklev (VDM), has 600 members. Legislation has been introduced to require the estimated 12,000 individuals who are said to be engaged in the real estate business to obtain a Federal license.

Qualified real estate brokers have signs over their office designating them as Immobiliere Maklev (real estate broker). Real estate brokers

1/ 1 E. J. Cohn, Manual of German Law 3-5 (2nd ed. 1968).
2/ *Id.* at 6-7.

must be listed in the Commercial Register (Handelsregister), which is maintained within the offices of the local court.[3]

A real estate broker charges a commission, the rate of which varies according to custom in the respective States, usually from 3 to 5 percent. The issue of whether the purchaser or the seller pays the commission fee is often determined by custom. Although a written agency agreement is not required for the broker to collect a commission, it is used in practice to avoid misunderstandings. Management fees usually are 4 percent of rental income for new property and 5 percent for old (prewar) property. A few of the well-established real estate brokerage firms specialize in areas such as industrial or rural property. Most real estate brokerage firms also will assist the purchaser, especially if a foreigner is securing financing, at a fee of 1 to 2 percent of the loan.[4]

Financing institutions and practices.--There are more than 300 commercial banks in Germany, most of which offer a complete banking service, but specialize in short-term credits to business and industry. They are allowed to lend on mortgages only up to 1 day less than 4 years. There are more than 800 savings banks (Sparkassen). They are important in granting mortgages, as well as providing short-term credit services. In the area of each of the regional central banks, a central savings bank (Girozentralen) exists and serves as a principal source of mortgage loans. Mortgage banks (Hypoteken), both privately and publicly owned, are important sources of financing home building as well as commercial and industrial property. Cooperative banks (Volksbanken) mostly serve local business and the working population and loan primarily for commercial and industrial property. Building and savings and loan associations (Bausparkassen) loan primarily for home mortgages and service the needs of member-depositors.[5]

In general, mortgage credit is easily available to finance any type of real estate investment, such as primary and secondary homes, commercial, and industrial projects. First mortgages are made for as much as 50 percent of the appraised value and for terms of up to 33 years. The Government can guarantee loans on private homes. Second and third mortgages may be obtained, usually from a community savings bank or a savings and loan institution for a term of not over 15 years, to finance the remainder of a real estate investment.

Construction and construction costs.--Construction in postwar Germany has flourished. Among the popular construction activities have been large self-contained shopping centers and modern industrial and office complexes, many of which have been built with investments by real estate investment trusts.

Construction must be done in accordance with a nationwide building code, which is administered by the Ministry of Economics through its office in each state, but under supervision by local authorities within

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3/ E. Cosner, Real Estate--European Style 202-03 (1976).

4/ Id. at 203-04.

5/ Id. at 196-97.

the area of the local court. New commercial and industrial buildings can be developed only in areas zoned for such activities.

The supervising architect prepares the construction schedule. The payment schedule is subject to negotiation. Ordinarily 20 percent of the payment is due upon the signing of the contract, 20 percent upon completion of the structural frame, 30 percent upon completion of the utility and plumbing installations, and the remaining 30 percent upon completion of the building and recording of the occupancy permit.6/

The law of immovable property.--In Germany, the third book of the Civil Code, entitled Sachenrecht, deals with the law of movable and immovable property. A principle under German law is that parties are not free to create any kind of absolute private right that they may wish to create. Rather, they can create only the type of rights that are provided for this purpose by the Code. This principle is referred to as the "closed catalogue of absolute rights," and contrasts with the law of obligations where the rule of "freedom of contract" applies.

Dispositions of immovable property are valid only if the effect which the disposition purports to have is indicated in the land register (Grundbuch). Only dispositions and cancellations of absolute rights in respect to immovable property require and are capable of registration.

The Grundbuch is not a register of deeds, but is a register of title setting forth the legal status of immovable property to which it refers.7/

The land register offices.--Each Land Register Office, which is known as a Grundbuchamter, has jurisdiction over all land in its district. Inspection of the Grundbuch is not open to the public, but is limited only to persons who can show that they have an interest, which is worthy of being recognized by law, in inspecting the Grundbuch. Every person for whom a right is registered in the Grundbuch or who has a claim to be registered as holder of a right or who is a creditor of a person who holds a registered right is considered as having an interest worthy of legal protection. However, the interest of public authorities and notaries is presumed.8/

As part of the land title records, a file copy (Handblatt) is maintained. Attached to the Handblatt is a residence sheet (Wohnungsblatt) which gives the addresses of all the persons on whose behalf rights are entered in the Grundbuch folio.

A list of owners of all properties in the district of a Grundbuchamter is maintained. The list gives the name, address and occupation of the owner and references to every folio of the Grundbuch where property of

6/ Id. at 207-08.
7/ Cohn, supra note 1, at 170-71.
8/ Id. at 190.

the individual owner is registered. This list does not include any mortgages or other private rights concerning immovable property held by an individual owner.[9]

Sale and transfer of real estate.--To be valid, the sale of real estate must comply with the rule of the civil code:

> A contract whereby one party binds himself to transfer ownership of a plot of land requires judicial or notarial authorization. A contract concluded without compliance with this rule becomes valid in its entirety if conveyance by agreement and entry in the land register have taken place.[10]

However, if the contract of sale is concluded abroad, the rule does not apply. It does apply to every contract which in any way brings directly or indirectly into existence an obligation to transfer property in land, such as the grant of an option to purchase land. Both offer and acceptance are subject to the rule.[11] A disputed issue is whether the rule applies to the sale of all the shares of a company whose property consists primarily of land.[12]

In several cases, particularly where agricultural property is being conveyed, the contract requires a government license to be authenticated.[13]

Although in theory the contract of sale and the transfer (Auflassung) are distinct transactions, they usually are combined in one document, particularly since special legislation allows notaries anywhere in Germany to authenticate an Auflassung of land outside their own district.[14]

German law requires that the Auflassung must be declared in the presence of both parties. To be effective, it must be followed by actual registration and must not be under a condition or come into force after the expiration of a fixed time period. Either the authenticated contract of sale or the offer of a contract of sale and acceptance must be submitted if the Auflassung and sale are not combined together. Although the presence of both parties is required, representation of either party by an agent with sufficient authority which is either authenticated or certified is possible. Hence, if one party resides outside Germany, such person can give a power of attorney to an agent who attends at the Auflassung on behalf of the principal. The certification or authentication of the power may be affected by a foreign notary, whose signature is legalized by the German consul.[15]

9/ Id. at 196.

10/ Burgerliches Gesetzbuch [BGB] sec. 3/3 (Ger.).

11/ Cohn, supra note 1, at 200.

12/ Commentaries on the BGB answer in the affirmative; however, the contrary is contained in the decision of the Reichsgericht in Price Waterhouse 1925, 1109.

13/ Cohn, supra note 1, at 201.

14/ Id.

15/ Id. at 202.

Land use, zoning and price controls.--Due to its relative scarcity of land and its high population density, German Governments (Federal, State, and local) have set forth a multitude of zoning controls which are strictly enforced. They embrace the control of real estate site density, height and architectural design of buildings, and the safeguarding of open space. An owner of property finds that it is virtually impossible to change the property's use if the change is inconsistent with the town plan. However, no laws restrict the number of occupants per dwelling unit.[16]

During and after World War II, the severe housing shortages resulted in the imposition by the Government of rent controls on all residential units. These controls were removed in 1969 except for all the old prewar units in Hamburg and Munich. Currently, no rent controls exist on industrial, commercial, or farm properties.[17]

On the Federal level, legislation has been introduced, and perhaps is in existence by now to diminish the amount of speculation in real estate by giving local municipal authorities greater planning powers. The introduction of this legislation responds to the sharp escalation of land prices for commercial and industrial real estate.[18]

Expropriation Law.--In Germany, expropriation (Enteignung) is provided for under State and Federal law.[19] The fundamental limitation on expropriation is contained in Article 14(3) of the Basic Law, which provides that expropriations:

> . . . are permissible only for the benefit of the general public. They must be effected by or under a law which contains provisions on the nature and measure of the compensation. The compensation must be determined by a fair consideration of the interests of the public and of those concerned. In case of disputes the ordinary courts decide on the amount of compensation.[20]

These rules have been litigated in the Federal Supreme Court, and these cases have strengthened the rights of private ownership. Foreigners owning real property in Germany also are protected by Article 14 of the Basic Law.[21]

Family law and rights in real property.--Originally, the fourth book of the Civil Code under the title of Familienvecht contained the entire law of domestic relations. However, the rules of the Civil Code on the relationship between husband and wife during matrimony have been replaced by the provisions added to the Code by the Law of Equal Rights of Men and Women in the Field of Civil Law of June 18, 1957 (BGBL I 609), referred to as the Equality Act.

16/ Natl. Assoc. of Realtors, International Real Estate Markets: A Comparative Study of Selected Nations 37 (1978).

17/ Id.

18/ Id.

19/ See, e.g., Federal Building Act of June 23, 1960, Bundesgesetzblatt [BGBI 1]I 341 (Ger.).

20/ Cohn, supra note 1, at 204-05.

21/ Id. at 205.

Under the Code, a patriarchal system existed wherein the husband with some limitations could administer freely the bulk of the wife's property and had a right to the interests resulting from its use to compensate him for the rule which required him to maintain the wife. However, the spouses could agree by a formalized contract that the statutory regime should be replaced by one of four other regimes, such as separation of goods, community of goods, community of earnings, and community of movable goods.

Under the existing law, the regular matrimonial regime, which is referred to as "community of surplus," is based on the belief that at the end of married life a surplus of property will exist, compared with the property existing when the spouses started their married life. The "community of surplus" regime applies unless the spouses have made a notarial contract on one of the other permitted regimes. If one of the spouses has his or her residence in another country when the marriage takes place or when the contract is executed, the spouses may incorporate aspects of a foreign jurisdiction's law into their contract.[22/]

Under the ordinary statutory regime, community of surplus is designed to bring about a reciprocal sharing of the spouses in the savings by either of them during their marriage. At the end of the marriage, otherwise than by death, the surplus realized by each spouse is calculated by deducting from the sum total of the value of his or her "terminal assets" the amount of the respective spouse's "assets at the start" of the marriage. A spouse whose surplus is lower than that of the other has an adjustment claim against the other in an amount equal to one-half of the difference between the respective surpluses. In the event that both spouses have not suffered a loss at the end of the marriage, no adjustment occurs. If one spouse has squandered or given away assets gratuitously, or has acted to the detriment of the other spouse, the court can adjust the claims accordingly.[23/]

The system of separation of goods applies if the spouses have agreed that it should apply or if the parties have agreed that the system of community of surplus should not apply without, however, agreeing on any other matrimonial regime. If it applies, the rules on the sharing of the surplus as well as those on the restriction of each spouse's power to dispose of his or her own property do not apply.[24/]

The third system of matrimonial regime is community of property. The spouses can limit the sphere of the assets to which community of property applies. Both spouses jointly have the right of administration in community of property.[25/]

Although the respective properties of the spouses can be managed separately, certain restrictions apply to the disposal of these properties.

22/ Cohn, _supra_ note 1, at 237.
23/ _Id._ at 237-39.
24/ _Id._
25/ _Id._

A spouse may not alienate his or her property as a whole without the consent of the other spouse. A court, upon motion for good cause from a spouse, may supplement such consent. A transaction without consent is ineffective.[26]

Descent and Distribution

The lines of descent in Germany are classified into orders. Included in the first order are the descendants of the deceased; in the second order, the parents of the deceased and their descendants; in the third order, the grandparents of the deceased and their descendants; in the fourth order, the great-grandparents of the deceased and their descendants; and in the fifth order or further order(s), the more remote ancestors of the deceased and their descendants.

The mode of distribution varies according to the order. In the first three orders, distribution is *per stirpes*; in the fourth and further orders, *per capita*. If relatives in a previous order are present, the rights of relatives in more distant orders are excluded. Children inherit in equal parts. In the second order, if both parents survive, they inherit alone in equal parts. If either parent is deceased and leaves descendants, these descendants obtain the share of the deceased. If no descendants survive, the surviving parent inherits the whole.

The surviving spouse receives, along with the first order of relatives mentioned above (e.g., the issue), one-fourth of the estate. In addition, the surviving spouse receives, along with relatives of the second order (the parents and their issue) and with the grandparents, one-half of the estate. In the latter case, the shares of the relatives aforementioned are reduced accordingly. In the event that no relatives of the first or second order or grandparents remain, but a spouse survives, the latter inherits the entire estate to the exclusion of more remote relatives.

A surviving spouse who inherits along with relatives of the second order or with grandparents also inherits, in advance, objects belonging to the matrimonial household and wedding gifts. A surviving spouse who has applied for divorce or has agreed to an application for divorce brought by a surviving spouse is excluded from rights of intestate inheritance.[27]

Foreign wills.--German law liberally recognizes wills of foreigners or wills made abroad. The Civil Code provides that the will of a foreign

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26/ 7 *Martindale-Hubbell Law Directory* 3555 (1979).

27/ The discussion on descent and distribution is derived from 7 *Martindale-Hubbell Law Directory* 3586-87 (1979). For a more comprehensive treatment in the English language, see Cohn, *supra* note 1, ch. 6.

national made pursuant to the law of his own country is recognized as valid if it is made according to the law of the place where it was made.[28]

Wills.--The Civil Code sets forth requirements for proper wills. A valid last will and testament may be made only by a competent testator personally and never through an agent. A last will and testament can be executed in two ways: a holographic will or a will before a notary.

The spouse and the children (or in their place their issue) of the deceased, and where there are none, the parents, have a statutory right in the estate aggregating one-half of their intestate shares. If the will does not properly provide for them, they have a right of action against the heir for the payment in cash of a proportionate amount of the estate. The testator can in exceptional cases deprive them of their legal shares, but the testator must set forth in the will the ground of deprivation.[29]

Forms of Business Enterprise

German law recognizes several incorporated and unincorporated forms of business. The most usual forms in which a business can be conducted are the following:

Public corporation.--An aktiengesellschaft (AG) is an incorporated business entity, whose shareholders' liability is limited to the unpaid portion of the nominal value of their shares. An AG is the form favored by large enterprises with high capital stock requirements since its shares, upon application, can be traded on the stock exchange.

Limited liability company.--A Gesellschaft mit beschrankten Haftung (GmbH) is an incorporated enterprise whose shareholders' liability is limited to an unpaid portion of the par value of their shares. The GmbH form is the most common form for foreign-owned businesses in Germany. The GmbH form is a more convenient form than the AG because the formalities under which a GmbH is formed and operated are much more simple and much less costly than those required for an AG.

General partnership.--An Offene Handelsgesellschaft (OHG) is an association of two or more persons (individuals or legal entities) who have unlimited personal liability for the debts of the firm.

28/ Introductory Law to the Civil Code, Art. 25, EGDGB, Art. 11. See also discussion in Cohn, supra note 1, at 274.

29/ 7 Martindale-Hubbell Law Directory 3599-3600 (1979); also see Cohn, supra note 1, ch. 6.

Limited partnership.--A Kommanditgesellschaft (KG) is an association with at least one general partner, who has unlimited liability for the debts of the firm, and one or more limited partners, who have liability limited to the amount of the agreed contribution to the partnership capital.

Limited partnership in the form of a GmbH and CoKG.--The GmbH and CoKG is a limited partnership. The only general or unlimited partner or one of the general partners is a limited liability company. Ordinarily the limited partners are the only shareholders of the limited company. Recently the GmbH and CoKG have been used to operate small and medium businesses.

Civil law partnership.--A Gesellschaft des burgerlichen Rects (BGB-Gesellschaft) is an association of individuals or companies combining for a joint contractual purpose. The partners are jointly liable for all the debts of the association.

Branch of a foreign corporation.--A Betriebsstratte or Niederlassung is not a legal entity.

Sole proprietorship.--An Einzelunternehmen is the business of an individual who has unlimited liability for the debts arising from the business.

Silent partnership.--A Stille Gesellschaft is an agreement between an enterprise and a participating silent partner.30/

Commercial Register

All commercial enterprises and merchants are required to register in the Commercial Register at the municipal court to validate their existence. Registration gives constructive notice to the public. All forms of mercantile and industrial enterprises such as individual merchants and other business, general and limited partnerships, stock corporations, and companies with limited liability must be registered in the Commercial Register. Certain representatives of a firm, particularly members of management, must be listed in the Commercial Register. Any amendment of a company charter must be filed for registration to have effect against third parties. The Commercial Register is open to the public, and any person may ask for an official certificate of entries and for certified copies of any document filed in the Register.31/

30/ The above information is derived from Price Waterhouse, Doing Business in Germany 31-32 (1978). See also 7 Martindale-Hubbell Law Directory 3581-84 (1979).

31/ 7 Martindale-Hubbell Law Directory 3580 (1979).

Laws Applicable Primarily to Foreign Investors

The law and decrees on foreign economic relations.--The Law on Foreign Economic Relations governs foreign investments in the Federal Republic of Germany.32/ The Law is implemented by the Decree on the Implementation of The Law on Foreign Economic Relations.33/

Under the Law, the Federal Government is authorized to impose certain restrictions on different types of investments by foreigners if certain conditions contained in the Law occur. The Law applies to any person who has his residence or usual place of abode within Germany.

Legal entities, as well as natural persons, are divided into residents and nonresidents in the application of the Law. Legal entities having their seat or place of management within the economic area are regarded as resident entities. Branch offices and permanent industrial establishments of nonresident enterprises are considered to be residents only if their management and accounting are within the economic area.

Section 26(2) of the Law authorizes the Federal Government to issue a decree requiring that legal transactions and foreign capital investments in Germany and the making and receiving of payments be reported and documented. The Law authorizes issuing a decree under the following circumstances: it is required to impose, remove, or relax restrictions; it is required to protect the balance of payments; it is needed to safeguard the interests of its economic policy; it will fulfill international agreements entered into by the Federal Republic of Germany; or it will implement the recently imposed economic restriction on mandatory deposits.

When a decree has been issued pursuant to the authorization, the reporting obligation applies to those who are residents of the Federal Republic of Germany and who are parties to legal transactions and actions in the Federal Republic. Hence, foreigners investing in German real estate come within the last requirements. Foreign investors who acquire more than 25 percent of an existing company's capital must report this to the competent state central banking authorities. To establish a branch operation of a foreign non-EEC corporation also requires prior authorization.34/

32/ Aussenwirtschaftsgesetz (AWG) of April 28, 1961. In Bundesgesetzblatt (BGBl; official law of the Federal Republic of Germany I. p. 481) as amended for the last time by the Third Law to Amend the Law on Foreign Economic Relations of March 29, 1976. In BGBI I., p. 864.

33/ Aussenwirtschaftsverordnung (AWV) of December 30, 1966 in the version of the proclamation of August 31, 1973 (BGBI I., p. 1069) as amended for the last time by the 37th decree to amend the AMV of December 22, 1976. In BGBI I., p. 3679.

34/ Price Waterhouse, supra note 30, at 14.

Reports must be made to the German Federal Bank (Deutsche Bundesbank) through the central banks of the lander and their branch offices or with any other agency designated by the Federal authorities or the state (land) governments.

The Law provides that restrictions may be imposed on the foreign investment in the Federal Republic of Germany. These restrictions may be imposed if they are required to: fulfill international agreements; protect the economy against harmful influences from abroad; or satisfy the needs of national security or foreign policy.

The restrictions which may be imposed under the Law are licensing requirements or the prohibition of certain transactions. Since 1974, a mandatory cash deposit has been required from resident borrowers, including resident branch offices and subsidiaries of nonresident enterprises. They must deposit, in an interest-free account with the German Federal Bank, a certain portion of any direct or indirect loan or credit given to them by a nonresident. Evidently, as a matter of policy, licenses required by the Law are never granted, and, therefore, a licensing requirement is tantamount to prohibition.

The following, excerpted from a recent Library of Congress study, indicates whether the Federal Government has imposed the permissible restrictions. 35/

35/ Library of Congress, Survey of Restrictions that Nations Place on Landownership by Nonresidents, in Staff of Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Foreign Investment in Agricultural Land, 219 (Comm. Print 1979).

Acquisition of real property or interest in real property by nonresidents in the Federal Republic of Germany (FRG)	Not imposed
Acquisition for consideration of enterprises, corporations, industrial establishments, or parts thereof in the FRG by a nonresident	Not imposed
Acquisition of ships, registered in the FRG, from residents by nonresidents for consideration	Not imposed
Purchase by nonresidents of treasury bills, treasury notes bearing no interest, governmental food storage agency bills, bills of exchange endorsed by a German bank drawn on a resident and payable within the FRG, and bills of exchange issued by a resident and endorsed by a German bank; bills of exchange issued by a resident and accepted by a German bank	Licensing required
German bearer or order bonds from residents	Licensing required
Receipt of interest by nonresidents on accounts with German banks	Licensing required
Mandatory cash deposit	Imposed

The Federal Government has the power under the Law to declare that violations of the Law constitute a criminal act and are punishable by imprisonment up to 1 year and/or a fine. In addition, it can decree that less-important violations are punishable only by a fine. Section 77 of the Decree makes it a violation for persons to enter into legal transactions in violation of the restrictions included in the Law and made effective by the Decree. Persons failing to report also are in violation of the Law, regardless of whether the violator is a resident or nonresident. The Law also authorizes the seizure of the object

to which the criminal act or violation relates or which was used to commit the act.36/

Unfortunately, at this juncture, since no copy of the Act is available in English in Washington, D.C., and since the Law has been amended at least 9 times and the Decree 37 times, additional detailed information is not yet available.

From time to time, reports in English appear, discussing either amendments or proposed amendments. Recent developments indicate that the Government is broadening its powers to compel the disclosure of the volume and specific items of assets that nonresidents have in Germany. The Government believes that without more comprehensive reporting requirements, a significant information gap will exist and the Government will not have adequate data to control its economy, especially in view of the increasing interdependence between Germany and the world economy.37/

Currency restrictions.--The Federal Bank has the authority to restrict transactions with nonresidents. However, in practice, general consents allow almost all transactions, including the formation of or the acquisition of interest in German companies, the transfer of profits abroad, and the repatriation of capital to nonresident investors. The reporting of larger receipts and payments in foreign currency is required.

During 1971-74, to reduce the inflow of foreign capital into Germany, German residents who borrowed or obtained finances from nonresidents were required to deposit a fixed percentage interest-free with the Federal Bank. Although a deposit of up to 100 percent could be required, the rate in practice never exceeded 50 percent.38/

Taxation

Introduction.--In Germany, taxes are levied by the Federal Republic, the States, and the local governments. U.S. and foreign investors in German real estate may be subject to three principal types of taxes: taxes on income; taxes on transactions; and taxes on property.

36/ The above information on the Law of Foreign Economic Relations is based on the Library of Congress study by Dr. William Solyom-Fekele June 1978. Dr. Solyom-Fekele, of the European Law Division of the Library of Congress stated that it is extremely tedious to try to piece together all of the amendments. Mr. Modley of the Commercial Section, FRG Embassy in Washington, D.C. confirmed this view.

37/ Common Market Reporter (CCH) New Developments, sec. 30,820.

38/ 7 Martindale-Hubbell Law Directory 3585, 3588 (1979).

German tax law distinguishes between resident and nonresident taxpayers. Resident taxpayers are subject, in principle, to German tax on their worldwide income, whereas nonresidents are subject to German tax only on certain specified income from German sources.

In many cases a U.S. person will choose to apply the tax treaty.

Income tax.--Income from, *inter alia*, business; agriculture; farming, business, and forestry investment; and rentals is taxable. In Germany, individuals generally are not taxed on gains from the sale or other disposition of nonbusiness property. An exception is made, however, for what are referred to as speculative transactions. They are taxed at normal rates. Capital gain is deemed speculative when real estate is resold before 2 years have elapsed since its acquisition. In addition, an individual is subject to tax on gains on the sale of a business, a partnership share, or a holding of more than 25 percent in a company. These gains are taxable at a reduced rate of one-half of the normal rate applicable to total income. Any other income is not taxable if not connected with business and speculation.

Income is subject to a progressive rate of tax up to 56 percent, which is reached at an income of approximately 130,000 D.M.

Certain allowable deductions may affect income. No depreciation is allowed for land. Buildings may be depreciated at a fixed straight-line percentage, which is much lower than compared to the depreciation allowed for similar U.S. commercial real estate. Local management expenses ordinarily are deductible, as are other current costs such as compensating of agents. Costs of ordinary repairs and redecoration, when done by the owner, also are deductible. Management expenses, or a portion of head-office overhead, are in principle allowable deductions if a German permanent establishment exists.[39/]

Rental income.--Rental income received by a direct nonresident corporate investor in German real estate will incur tax at the flat federal rate of 49 percent, plus any applicable surcharges, regardless of whether or not the profits are retained in Germany or the investor is considered to have a permanent establishment in Germany.

Rental income derived by a German company is considered as normal business income, although trade tax is probably not due. Dividends, when remitted abroad, incur withholding tax. From a tax perspective, it is more advantageous to receive rental income via a GmbH within the regime of an applicable tax treaty than directly or through a branch. However, if net rental income is not significant (e.g., interest expenses

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39/ J. Chown & M. Edwardes-Ker, The Acquisition of Assets, Companies and Real Estate in Belgium, France, Germany, The Netherlands, and the U.K., 96-97 (1974).

may equal rental income), direct investment through a branch may be the most beneficial vehicle, especially due to avoidance of the costs of a GmbH such as the 1 or 2 percent investment tax.[40/]

Corporation tax.--Since 1977, profits of corporations distributed as dividends have been taxable at 36 percent, and profits not distributed at 56 percent. The shareholder receiving dividends is granted relief (known as an imputation credit). However, this credit is available only to German tax residents, and not to persons subject only to a limited tax liability. The tax rate for foreign companies doing business in Germany through a branch is 50 percent on profits received from the branch.[41/]

Real estate acquisition tax.--Two types of liability for acquiring real estate may arise in Germany:

(1) The transfer of real estate from one party to another, unless the transfer is specifically exempt from the transfer tax, such as occurs if it is subject to inheritance or gift tax.

(2) One person or group acquires all or substantially all (e.g., more than 95 percent) of the shares in the company or partnership which owns real estate.

In the first case mentioned above, the vendor and purchaser are jointly liable for the tax. However, even if one party obligates himself in a purchase agreement to discharge the liability to this tax, the tax authorities can, in case of default, still claim the tax from the other party. In the second case mentioned above, the acquiring shareholder(s) is liable for the tax.

The real estate acquisition tax is based in the first case on purchase price and in the second case on the taxable value of the real estate. The rate of tax ordinarily is 7 percent of the assessable amount, but is only 6 percent on real estate transferred to a company in exchange for capital stock.[42/] A capital transaction tax also is levied on capital paid by shareholders to a German company as well as on the transfer of shares and debentures from one party to another. The rate of capital investment tax is 1 percent of the taxable amount, but it is reduced by 50 percent in certain circumstances.

Trade tax.--A municipal trade tax is imposed by municipalities or communities and in general is based partly on trade income and partly on trade capital. The calculation of the tax rate is complicated and in

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40/ Id. at 98.
41/ 7 Martindale-Hubbell Law Directory 3598 (1979).
42/ Price Waterhouse, supra note 30, at 156-57.

practice amounts to 2 to 17 percent of taxable income. The amount of trade tax is deductible for purposes of determining income and corporation tax.43/

Capital tax.--The property of both individuals and corporations is subject to the capital tax. This tax on total assets is charged annually at the rate of 0.7 percent for individuals and 1 percent for corporations. Certain elements of property are exempt from this tax. Included in the evaluation of financial assets for purposes of assessing the tax is real property, which must be stated at its (special) value determined for tax purposes.

Persons such as foreigners who are liable only to limited tax liability are subject to capital tax only on German assets, primarily agricultural and forest property, real property, mortgage loans, and other claims if secured by German real property.44/

Turnover (value added) tax.--A turnover tax in the form of a value-added tax (VAT) is assessed on the basis of proceeds received by entrepreneurs for deliveries under or services rendered within Germany. The standard tax rate is 12 percent.45/

The purchase of real estate is not subject to a turnover tax since a real estate transfer tax is charged. Although rental income is in principle exempt from VAT, the lessor can choose whether to make the rent subject to VAT. The lessor usually will choose to make the rent subject to VAT in the case of commercial property. The tenants can obtain a credit for the VAT they pay on their rents or obtain a refund, and therefore will not suffer an economic burden from paying VAT. The lessor can derive benefits from paying VAT since he can credit the VAT he pays on builder's costs, repairs, fees, and commissions (if he makes the election to be subject to VAT before he orders goods and services) against the VAT for which he is liable on rental income.46/

Inheritance and gift tax.--The gratuitous transfer of property either through death or by gift is subject in Germany to an inheritance and gift tax. Insofar as it applies to transfers of property by reason of death, the tax is imposed on the recipient (heir) of the property. If the tax applies to gifts inter vivos, the donor and the donee are jointly liable for its payment.47/

If the decedent or donor are nonresidents, only the portion devolving upon German beneficiaries is taxable. If neither testator nor donor,

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43/ 7 Martindale-Hubbell Law Directory 3598 (1979).
44/ Id.
45/ Id.
46/ Chown and Edwardes-Ker, supra note 39, at 97-98.
47/ Price Waterhouse, supra note 30, at 141.

nor beneficiary, are German residents, only German real estate or certain business property situated in Germany is taxable. Mortgages are deemed to be real estate.48/

The value of the transferred property on which the inheritance and gift tax is levied is the amount by which the transferee is enriched--the gross value less applicable deductions. The determination of the gross value of the property is made pursuant to the rules of appraisal law and as of the date of death or of the gift, except where a different effective date or method of valuation is required, by the inheritance law.49/

The tax rate which applies to an estate or gift depends upon the size of share received and the degree of kinship of the beneficiary to the decedent or donor. It ranges from 3 to 35 percent for a surviving spouse or child, and from 30 to 70 percent for unrelated beneficiaries. The highest tax rate of 70 percent applies to persons without relationship to a decedent or donor who receives more than 100 million DM.

There is duplicate estate and gift taxation of U.S. persons with property in Germany because of the difference in U.S. and German tax systems. The United States taxes its citizens even if they reside abroad, whereas the German tax is imposed only on persons domiciled there. Therefore, the same estate may be taxed by the United States because it belongs to a U.S. citizen and by Germany because either the U.S. decedent or beneficiary was residing in Germany at the time of death or, in addition, because the property was located in Germany.50/

International Agreements

Two bilateral treaties between the United States and the Federal Republic of Germany provide significant benefits to U.S. persons. These treaties are the Treaty of Friendship, Commerce, and Navigation and the double-taxation treaty.

The Treaty of Friendship, Commerce, and Navigation.51/--For background, the reader should refer to the discusson of FCN treaties in the first part of this chapter.

The U.S.-German FCN treaty provides that U.S. nationals and companies shall be accorded in Germany national treatment with respect to leasing land, buildings, and other real property which is appropriate to the conduct of activities in which they are specifically permitted to engage under the treaty for residential property, and with respect to occupying and using such property.52/

48/ 7 Martindale-Hubbell Law Directory 3598-99 (1979).
49/ Price Waterhouse, *supra* note 30, at 141.
50/ 7 Martindale-Hubbell Law Directory 3599 (1979).
51/ Protocol and Exchange of Notes, Oct. 29, 1954, U.S.-West Germany, 7 U.S.T. 1839, T.I.A.S. 3593, 273 U.N.T.S. 3.
52/ *Id.* Art. IX(1).

The FCN treaty is vague and provides very limited rights to U.S. citizens with respect to the acquisition, owning, and holding of land. In the Article setting forth national treatment for leasing land, it gives U.S. persons other rights in real property which are permitted by the applicable laws of Germany. Fortunately, however, German domestic laws are liberal with respect to U.S. persons owning real estate.53/

In the protocol to the treaty, Germany has the right to require that the granting of rights to engage in mining on the public domain be dependent on reciprocity.54/ The treaty allows Germany to take measures restricting investment by U.S. persons relating to fissionable materials, to radioactive byproducts of the utilization or processing thereof, or to materials that are the source of fissionable creativity. U.S. aliens may establish, acquire interests in, or carry on enterprises engaged in Germany in the exploitation of land or other natural resources.55/

Under the treaty, U.S. nationals and companies have a right to receive national treatment in Germany with respect to acquiring property by testate or intestate succession or under judicial sale to satisfy valid claims. The treaty also provides that if U.S. persons, because of their alienage, become ineligible to continue to own such property, they should be allowed a period of at least 5 years to dispose of it.56/

Under the treaty, it is provided as a general principle that U.S. nationals and companies shall be accorded, within the territory of Germany, both national and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing personal property of all kinds, both tangible and intangible. However, the treaty does allow Germany to impose some exceptions. Specifically, Germany may restrict ownership by U.S. persons of materials dangerous from the standpoint of public safety and ownership by U.S. persons of interest in enterprises which undertake activities set forth elsewhere in the treaty, namely communications, air or water transportation, taking and administering trusts, and banking involving depository functions, or the exploitation of land or other natural resources. Nevertheless, if Germany imposes such limitations, they cannot be applied against enterprises which are already engaged in such activities at the time such restrictions are adopted.57/

Under the treaty, U.S. nationals and companies have a right to national treatment with respect to engaging in all types of commercial, industrial, financial, and other activity for gain. The treaty also provides that U.S. nationals and companies in Germany have a right to (1) establish and maintain branches, agencies, offices, factories, and other establishments appropriate to the conduct of their business; (2) organize companies under the general company laws of the other party and acquire majority interests in companies of such other party; and (3) control and

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53/ Id. Art. XI(1)(b).
54/ Id. Protocol, para. 12.
55/ Id. Art. VII(2).
56/ Id. Art. IV(3).
57/ Id. Art. X(2).

manage enterprises which they have established or acquired. It also is provided in the treaty that enterprises which are controlled by U.S. persons or nationals, whether in the form of individual proprietorship, companies, or otherwise, have a right, in all that relates to the conduct of such activities, to receive treatment no less favorable than that accorded like enterprises controlled by nationals or companies of Germans.58/

The treaty gives U.S. nationals and companies in Germany the right to national and most-favored-nation treatment with respect to disposing of property of all kinds.59/

Income tax treaty between Germany and the United States.--The income tax treaty applies specifically in the case of the Federal Republic of Germany to: income taxes; corporation taxes; trade taxes; capital taxes; and to any other tax of a substantially similar character imposed by Germany after the signing of the treaty.60/

According to the treaty, income from real property situated in Germany and royalties from the operation of mines, quarries, or other natural resources located in Germany, including gains derived from the alienation of items of the above-mentioned property, may be taxed in Germany.61/

The treaty provides that gain derived by a resident or corporation or other entity of the United States from alienating real property royalties in respect to the operation of mines, quarries, or other natural resources located in Germany is exempt from tax in Germany, unless the U.S. person has a permanent establishment in Germany and the gain is derived from the alienation of a capital asset which is effectively connected with such permanent establishment.62/

Interest income earned from bonds, notes, debentures, securities, or any other forms of indebtedness, including debts secured by mortgages, derived by residents or corporations of the United States, are exempt. However, the exemption does not apply if the U.S. creditor has a permanent establishment in Germany with which the debt claim giving rise to the interest is effectively connected.63/

Royalties derived by a resident or corporation of the United States are exempt from tax by Germany. Royalties include gains derived from the alienation of any right or property giving rise to such royalties. However, the exemption does not apply if, for example, the U.S. licensor has a permanent establishment in Germany with which the right or property giving rise to the royalties is effectively connected.64/

58/ Id. Art. VII(1).
59/ Id. Art. IX(3).
60/ Id. Art. I(1)(b) and (2).
61/ Id. Art. IX(a).
62/ Id. Art. IX A(1)(3).
63/ Id. Art. VII.
64/ Id. Art. VIII.

The German withholding tax on dividends paid by a German corporation to a resident or corporation of the United States is limited to 15 percent, subject to certain conditions. One condition is that if the recipient is a U.S. corporation which owns directly in the German corporation at least 10 percent of the latter's voting shares, the tax may exceed 15 percent, but not 25 percent of that portion of the dividend which is deemed to be reinvested. However, this provision applies only if Germany imposes a corporation tax on the distributed profits of a German company at a rate of at least 20 percentage points lower than the corporation tax imposed on its undistributed profits.

The rate of withholding tax is raised from 15 to 25 percent, if the U.S. corporation transfers money or other property directly or indirectly as a loan or as an increase in the equity capital of the German company, or as any other form of investment in such company. If the amount transferred exceeds 7.5 percent of the dividends received by the U.S. corporation in the calendar year in which such transfer occurs, then the entire amount transferred is to be considered a reinvestment of dividends, received from the German company in the preceding, the same, or the succeeding calendar year to the extent of such dividends.65/

65/ *Id.* Art. VI.

Japan

Introduction to the Legal System

Much Japanese law is derived from a German-inspired Civil Code which was adopted at the turn of the century. After World War II, the common law and the American legal system exerted a strong influence, especially in the judicial organization and in its constitutional and administrative law.1/

Laws Governing Real Property

Types of real property.--In Japan, the only real property rights which can be created are those set forth in the Civil Code or in other laws. The Civil Code provides for the following rights in real property:

1. Ownership (Shoyuken) is a complete property right, comparable to fee-simple ownership;

2. Possession (Senyuken) is a right which will be protected against parties without rights;

3. Superficies (Chijoken) is a right to use and own structures or trees on another's land;

4. Emphyteusis (Eikosakken) is a right to use another's land for cultivation or grazing;

5. Servitude (Cheikiken) is a right to use another's land for the benefit and convenience of one's own land, and is comparable to an easement in Anglo-American law;

6. Commonage (Traiken) is based on old custom whereunder residents of a village use a forest or plain in common.2/

Security interests in real property.--Four types of security interests in real property in Japan are set forth in the Civil Code. A right of retention (Ryuchiken) is a type of possessory lien. A preferential right (Sakidori Tokken) is a type of statutory lien. A pledge (Shichiken) and a mortgage also are provided for in the Code.3/

1/ For materials and references concerning the Japanese legal system, see K. Nakamura, Formation of Modern Japan as Viewed from Legal History (1964); Law in Japan: the Legal Order in a Changing Society (A.T. von Mehren ed. 1963).

2/ Mimpo (Civil Code) secs. 180, 260, 2665, 270, and 280, in 7 Martindale-Hubbell Law Directory 3738 (1979).

3/ Civil Code secs. 295, 303, 342, and 369, in id.

Mortgages.--In Japan, a particular piece of real property may be encumbered. A mortgage has priority in the event that the property is foreclosed. However, in Japan the creditor-mortgagor does not obtain transfer of title or possession.4/ To be created, a mortgage must be for the purpose of securing performance of an obligation which is specifically described. The Civil Code provides that mortgages may be created only in real rights of ownership, superficies, emphyteusis, and immovables. In addition, legislation provides for mortgages of *inter alia*, standing timber, factory foundations, mining rights, and agricultural implements.

A mortgage can be valid without recording, but an unrecorded mortgage cannot be asserted against a third party having an interest in the mortgaged property.5/ Under the Real Property Registration Law, the earliest registered mortgage has priority over other mortgages.

If a debtor falls into arrears on mortgaged property, a mortgagee can apply to a district court to have the mortgaged property auctioned.6/

In 1931, a system of mortgage certifications was started, and registration offices issue mortgage certificates for land, buildings, and superficies. These certificates combine both the mortgage and the obligation secured thereby, and are negotiable instruments. They are irrevocable and are transferred by endorsement.

Rights of spouses in real property.--Under Japanese law, property acquired by either spouse before marriage will continue, after marriage, to be his or her separate property.7/ Since the husband and wife are required to share the expenses of married life, and to take mutual liability for acts concerning household matters, property whose ownership is not clear is presumed to be owned by the husband and wife jointly.8/ If the spouses provide otherwise, they must give notice to a third person of contrary intent to relieve a noncontracting spouse from obligation.9/ Either spouse can acquire property separately during marriage. Upon divorce, property acquired by joint efforts may be ordered divided regardless of which party has legal title.

A husband and wife also may enter into a prenuptial arrangement for property different from that set forth under law. However, such an arrangement must be registered to be enforced against their successors or third persons.10/

4/ Civil Code sec. 369, in *id*. at 3735.
5/ Civil Code sec. 177, in *id*.
6/ Civil Code sec. 387 and Auction Sales Law 22 *et seq*., in *id*.
7/ Civil Code sec. 762 in *id*. at 3733.
8/ *Id*.
9/ Civil Code secs. 760, 761 in *id*.
10/ *Id*.

Aliens who arrange for a property relationship different from that prescribed by the husband's country must register those provisions within 1 year after they establish a permanent residence in Japan to enforce such a relationship against their successors or third persons in Japan.11/

Conveying property.--Title to real property can be transferred by a simple declaration of intention. However, registration is necessary to enforce such transfer against third parties.12/

Recording property conveyances.--Property registration is administered by the Ministry of Justice, which has offices throughout Japan. Rights in real property which are subject to registration include ownership, superficies, emphyteusis, leases, and reversions. Particular types of property encumbrances, such as pledges, mortgages, and preferential rights, also may be recorded.13/ Unrecorded property rights may be enforced between parties, but they must be recorded to be enforced against third parties.14/

Since Japanese law allows a separation of ownership of buildings from land on which the buildings are situated, separate records often are maintained for buildings.15/ Contractual arrangements or incomplete assignments of real property can be provisionally registered and thereby protected against subsequent transfers to third parties.16/ Similarly, contracts regulating property between husband and wife must be registered.

Certain provisional or contingent rights in real property, such as an enforceable promise to sell and resell an immovable, may be recorded.

Trusts.--In Japan, the law of trusts is codified and is based on Anglo-American concepts, but is modified in accordance with some concepts of continental law. Although in theory trusts may be created by operation of law, they arise in practice from private acts and agreements. To be protected against the rights of third parties, the instrument by which a trust is created should be recorded if, for example, real property, mining rights, and stock shares are created.17/

Descent and Distribution

In Japan, one system of succession applies to all estates, regardless of sex or family status of ancestor or successor, and to property of all descriptions.

11/ Civil Code sec. 757, in *id*.
12/ Civil Code secs. 176, 177, in *id*. at 3738.
13/ Real Property Registration Law 1, in *id*.
14/ Civil Code sec. 177, in *id*.
15/ Civil Code sec. 86 in *id*.
16/ Real Property Registration Law secs. 2, 6, and 7 in *id*.
17/ 7 *Martindale-Hubbell Law Directory* 3741 (1979).

The order of succession in Japan is the following: (1) children, (2) lineal ascendants, and (3) brothers and sisters. When a child, brother, or sister of the deceased is survived by a lineal descendant, such a descendant may share per stirpes in the estate of the ancestor. A surviving spouse takes a one-third share when children or their lineal descendants are cosuccessors and a two-thirds share when brothers and sisters or their lineal descendants are cosuccessors. Two or more lineal descendants or lineal ascendants or brothers and sisters share equally.[18/]

Within 3 months after becoming aware of the start of succession, a successor must either: (1) unconditionally accept the estate; (2) accept it conditionally, e.g., with a reservation that obligations and legacies of an ancestor will be paid only to the extent of property acquired by reason of the succession; or (3) renounce it entirely.[19/] A successor not expressing his decision within 3 months will be presumed to have unconditionally accepted the inheritance.

An ancestor may disinherit a presumptive successor in the event of cruelty, gross insult, or misconduct on the part of a successor, with the permission of the family court.

Gifts inter vivos to successors related by marriage or adoption are included within the estate of succession unless a contrary intention is expressed by the ancestor.[20/]

Municipal Laws Applicable Particularly to Foreigners

Municipal laws applicable to foreigners investing in real estate.--The Alien Land Law of 1925 provides that aliens and Japanese corporations controlled by aliens in principle have a right to own land. However, the same reserves the Government's right to landownership in specific areas designated significant for national defense.[21/]

18/ Id. at 3731-32.
19/ Id.
20/ Id.
21/ Law No. 42, April 1, 1925.

The Cabinet Order Relating to Alien Acquisition of Property also sets forth restrictions. It provides that a national of a foreign country which has normal diplomatic relations with Japan, such as the United States, can acquire land, buildings, or accessories to property in Japan for his or her own personal use. However, an alien wanting to acquire such property for purposes other than personal ones, must obtain a government permit. In such a case, the acquisition of property without a permit is void.

Municipal laws applicable to foreigners investing generally.--Prior to joining the Organization for Economic and Cooperative Development (OECD) in 1964, Japan had a restrictive posture towards foreign investment. However, its membership in the OECD and its signature of the Code of Liberalization of Transfer of Capital Movements have resulted in a gradual liberalization of its foreign investment laws (in five stages).

In addition to the above-mentioned laws and regulations concerning foreign investment in Japan, municipal laws require governmental approval prior to investing in Japan and acquiring certain types of property. A foreign investor, as defined in the Foreign Investment Law, is a foreign resident in Japan; an exchange nonresident individual; a foreign corporation; or a Japanese subsidiary or corporation owned or controlled, in fact, by foreign nationals or foreign firms.

The criteria for validating foreign investments are contained in the Foreign Investment Law, a related cabinet order, and ministerial ordinances. Foreign investments are defined to include most acquisitions of stock, beneficiary certificates, corporate debentures, international loans, and technological assistance agreements. Applications for investment validation are made to the Ministry of Finance. A foreign investor obtaining validation is entitled to withdraw profits and repatriate his investment, subject only to such conditions as may be imposed in the validation approval or as otherwise provided in law.

For purposes of validating foreign investment applications, all industries are classified into two groups: partially liberalized and fully liberalized. Partially liberalized investments include, *inter alia*, agricultural, forestry, marine products, mining, and petroleum. Hence, many investments proposed by U.S. persons in income producing property would require validation. All other industries are fully liberalized.

Regulations applicable to foreign investors also vary according to whether the foreign investment is in a new company or an existing company. With regard to investment in new companies in the partially liberalized sector, automatic validation to acquire shares will be given

to the foreign investor only if that shareholder will control fewer than 10 percent of the outstanding shares and the total foreign shareholding will be less than 25 percent (or not more than 15 percent in case of the fishing industry).

Foreign investment in existing companies is subject to different regulations. If an existing company is a partially liberalized industry or if it is in a fully liberalized industry and does not consent to foreign-share acquisition, automatic validation will be given only if the shareholding of the acquiring foreign investor will be less than 25 percent in most companies and will not exceed 15 percent in certain restricted activities such as mining, fishing, banking, public utilities, etc. If an existing company is a fully liberalized industry and consents to foreign-share acquisition, automatic validation will be given without limitation on foreign shareholding.

In all cases of automatic validation, a foreign investor also must satisfy certain qualifications unrelated to the percentage of foreign shareholding. If the foreign investor does not satisfy these qualifications or if foreign shareholding will exceed limits eligible for automatic validation, its application for share acquisition will be subject to close government scrutiny.[22]

Taxation

General.--U.S. persons investing in Japanese real estate may be subject to both national and local taxation. National law limits both the extent and categories of local taxes.

All income of individuals domiciled or resident in Japan is taxable, although certain exemptions are permitted to residents of not more than 5 years who do not intend to reside permanently in Japan.

Nonresidents also are taxable to the extent they derive income from sources within Japan. The rate of income tax is progressive, with the top rate of 75 percent for net incomes over 80 million yen. Nonresident individuals and corporations are subject to a withholding tax of 20 percent on most types of Japanese-source income, such as royalties, interest on loans, and dividends. These rates are reduced under the U.S.-Japan income tax treaty, which is discussed below.[23]

Inheritance tax.--An inheritance tax is charged to recipients domiciled in Japan at the time of inheritance and to recipients domiciled elsewhere who acquire assets located in Japan through inheritance. The inheritance tax is imposed at a progressive rate, with the top rate at 75 percent for taxable amounts over 500 million yen. A surviving

22/ 7 Martindale-Hubbell Law Directory 3732-33 (1979).
23/ Id. at 3740; Price Waterhouse, Doing Business in Japan 64 (1975).

spouse is exempt from tax that would be payable on a decedent's net estate up to a value of 40 million yen, or if greater, one-third of the decedent's net estate.

Gift tax.--Japan imposes a gift tax on recipients domiciled in Japan and on recipients domiciled elsewhere who acquire assets located in Japan. The rate of tax is progressive, with a top rate at 75 percent for taxable assets of over 70 million yen.[24]

Corporation tax.--A tax is imposed on the income of Japanese corporations. A foreign corporation is subject to the corporation tax only for Japanese source income. A uniform tax rate of 40 percent is imposed on income of business corporations which have capital of more than 100 million yen. Business corporations which do not have capital of more than 100 million yen have a tax rate of 28 percent on taxable income up to 7 million yen and to 40 percent for taxable income of more than 7 million yen. A reduced rate of 30 percent (or 22 percent for taxable income not exceeding 7 million yen) is imposed on a corporation with capital of not more than 100 million yen to earnings earmarked for dividends.[25]

International Agreements

Japan is a party to several agreements which affect investment by U.S. persons in its real estate. The agreements are the Treaty of Friendship, Commerce, and Navigation; an agreement guaranteeing private investment; the treaty governing income taxation; and the treaty governing estate and gift taxation.

The Treaty of Friendship, Commerce, and Navigation.[26]--The U.S.-Japanese Treaty of Friendship, Commerce, and Navigation (FCN), signed and entered into force in 1953, is comprehensive and recent, compared with many other such treaties.

As do most of the FCN treaties concluded after 1946, this treaty provides that U.S. nationals and companies are entitled in Japan to national treatment with respect to leasing land, buildings, and other immovable property appropriate to the conduct of activities in which they may engage pursuant to Articles VII and VIII of the treaty.[27] Article VII provides that U.S. persons may engage in all types of commercial, industrial, financial, and other business activities in Japan. However,

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24/ 7 Martindale-Hubbell Law Directory 3740 (1979).
25/ Id. at 3740; Price Waterhouse, supra note 23, at 75-78.
26/ April 2, 1953, 7 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143.
27/ Id. Art. IX(1).

Japan reserves the right to limit the extent to which U.S. persons within its territories may establish, acquire interests in, or carry on certain enterprises, including the exploitation of land or other natural resources.28/

The FCN treaty also provides that U.S. persons are entitled to national treatment in leasing land, buildings, and other immovable property for residential purposes and with respect to occupying and using such property.

The treaty also gives U.S. nationals and companies other rights in immovable property permitted by the applicable laws of Japan.

As is true with many of the recent U.S. FCN treaties, no provisions exist in the U.S.-Japan FCN treaty with respect to acquiring real property in Japan. In fact, in the treaty Japan expressly reserves the right to prohibit U.S. nationals and companies from exploiting land or other natural resources, most of which are considered partially liberalized industries in the foreign investment legislation.

The treaty contains a provision common in most of the recent U.S. FCN treaties, wherein U.S. nationals and companies have the right to dispose of property in Japan that was acquired through testate or intestate succession and their alienage prevents them from receiving national treatment. They have at least 5 years to dispose of such property.

The U.S.-Japan FCN treaty contains provisions almost identical to those described in the section on personal property in the first part of this chapter. U.S. persons and companies have a right in Japan to receive national and most-favored-nation treatment with respect to acquiring by purchase, lease, or otherwise, and to owning and possessing movable property. However, Japan may restrict ownership by U.S. nationals and companies of materials dangerous from the standpoint of public safety and ownership of interests in enterprises carrying on specified activities, such as the exploitation of land and natural resources, public utilities, shipbuilding, etc. This is done only to the extent that the restrictions can be imposed without impairing the rights and privileges, noted in the treaty, of U.S. persons to engage in all types of commercial, industrial, financial, and business activities. Hence, the rights and reservations appear contradictory or unclear at best.29/

U.S. companies (and nationals) are entitled to national treatment when they engage in all types of commercial, industrial, financial, and business activities in Japan. The treaty also entitles U.S. companies and nationals in Japan the rights to establish and maintain branches, agencies, offices, factories, and other establishments appropriate to the conduct of their business; to organize companies in Japan and to acquire majority interests in Japanese companies; and to control and manage enterprises which they have established or acquired.30/

28/ Id. Art. VII.
29/ Id. Art. IX(2).
30/ Id. Art. VII.

Under the FCN treaty, property in Japan of U.S. nationals and companies may not be taken except for a public purpose and only with prompt payment of just compensation. In addition, the compensation must be paid in an effectively realizable form and shall be the full equal of the property taken. The Government of Japan is required to adequately provide, at or prior to the time of taking, for the determination and payment of compensation.[31/]

Like most U.S. FCN treaties entered into after World War II, the U.S.-Japan treaty gives U.S. nationals and companies access to Japanese courts and administrative tribunals on a national-treatment basis.[32/]

The FCN treaty provides that products of U.S. nationals and companies are entitled to national treatment in all matters of internal taxation.[33/] In addition, two tax treaties--one for income taxes and the other for estate and gift taxes--are in force between the United States and Japan (see discussion below).

Income tax treaty.--The income tax treaty in force between the United States and Japan contains many provisions which may govern the taxation of investments by U.S. persons in Japanese real estate. Some of the important provisions are highlighted here.

The treaty provides that income from real property, including royalties derived from the operation of mines or quarries, or the exploitation of any natural resources in Japan and gains derived from disposing of such property or of the right giving rise to such royalties may be taxed in Japan when such property is situated in Japan. Income derived from the usufruct, direct use, letting, or other use in any form of real property in Japan may also be taxed by Japan. However, under the treaty, interest on indebtedness secured by real property or secured by a right giving rise to royalties in respect to the operation of mines or quarries or the exploitation of any natural resources are not considered as income from real property.[34/]

The treaty also sets forth how capital gains of U.S. persons deriving investments in Japan are taxed. It provides that gains from the sale, exchange, or other disposition of capital assets derived by a resident of the United States shall be exempt from tax in Japan unless, *inter alia*: the gain is derived by a U.S. resident from the sale, exchange, or other disposition of real property in Japan; or the U.S. person receiving the gain has a permanent establishment in Japan and the property giving rise to the gain is effectively connected to the permanent establishment; or the U.S. recipient of the gain is a resident of Japan or is present for a period(s) of more than 183 days in a taxable year or maintains a fixed base.[35/] The capital gains provisions described would

31/ *Id.* Art. VI(3).
32/ *Id.* Art. IV.
33/ *Id.* Art. XVI.
34/ *Id.* Art. XV.
35/ *Id.* Art. XVI.

apply in the event that a U.S. corporation invested in income-producing property in Japan and wanted to realize its appreciated equity in the corporation by selling stock.

The treaty provides that the rate of withholding tax in Japan, as the source country, on interest derived by a resident of the United States is limited to 10 percent, unless the U.S. recipient has a permanent establishment in Japan and the interest is effectively connected with the permanent establishment. The treaty provides that the rate of withholding by Japan, as the source country, of the dividends derived by a resident of the United States is limited to 15 percent, if the recipient does not have a permanent establishment in Japan to which the dividends are effectively connected. The withholding tax is limited to 10 percent in the case of intercorporate dividends if the recipient corporation owns at least 10 percent of the payor corporation and not more than 25 percent of the income of the payor corporation is derived from interest and dividends other than those received from the subsidiary corporation.[36]

Estate and Gift Tax Treaty

In the event a U.S. person, after having acquired real estate in Japan, dies, the treaty provides for the allocation of estate and gift taxes. It provides that, if a decedent at the time of his death or a donor at the time of the gift was a national of or domiciled in the United States, or if a beneficiary of a decedent's estate at the time of such decedent's death or a beneficiary of a gift was domiciled in Japan, the situs at the time of the transfer for the purpose of imposition of the tax and credit authorized by the treaty will be determined, *inter alia*, in accordance with the following rules:

1. Immovable property or rights therein are considered to be situated at the place where the land involved is located;

2. Debts are considered situated at the place where the debtor resides;

3. Mining or quarrying rights or mining leases are considered to be situated at the place of such mining or quarrying; and

4. Shares or stock in a corporation are considered situated at the place where the debtor resides.[37]

The treaty also sets forth rules providing for exemptions and credits in circumstances defined in the treaty.[38]

The treaty helps to ensure that estate and gift taxes and inheritance taxes are not imposed twice on U.S. persons investing in Japanese real estate.

36/ *Id.* Art. XII.
37/ *Id.* Art. III.
38/ *Id.* Arts. IV and V.

Agreement regarding investment guaranties.[39]--The treaty provides that the contracting state will, upon the request of either government, consult respecting projects in Japan proposed by nationals of the United States with regard to which guarantees under §111(b)(3) of the Economic Cooperation Act of 1948, as amended, may be made or are under consideration.[40]

Under the treaty, the U.S. Government extends guaranties which it makes in accordance with the consultation provisions of the section referred to in Article I and which are approved by Japan. It provides that if the U.S. Government pays a claim to any person under such a guaranty, the Government of Japan will recognize the transfer to the U.S. Government of any right, title, or interest of such person in assets, currency, credits, or other property on account of which such payment was made and the subrogation of the U.S. Government to any claim or cause of action of such person arising in connection therewith. The Government of Japan also agrees to recognize any transfer to the U.S. Government pursuant to such guaranties received from the Government of Japan.[41]

The agreement also provides that any claim against the Government of Japan to which the U.S. Government may be subrogated as a result of any payment under a guaranty shall be the subject of direct negotiations between the two Governments. If, after a reasonable period, they cannot settle their claim, they must arbitrate it.

39/ March 8, 1954, 5 U.S.T. 791, T.I.A.S. No. 2968, 232 U.N.T.S. 251.
40/ *Id.* Art. I.
41/ *Id.* Art. II.

Introduction to the Legal System

In Mexico, the principal source of law is the Constitution, the latest version of which came into existence on May 1, 1972. The Constitution provides for two systems of codified law: Federal and State. Federal statutes govern primarily commercial transactions, labor, and mining matters, whereas State law deals chiefly with criminal and most civil matters.

Pursuant to the Constitution, the main body of property law is the Civil Code of the Federal District and Federal Territories, and the similar, almost verbatim, civil codes of the individual States, enacted in 1928.[1/]

Climate and Laws Governing Real Property

Housing construction.--The private sector is primarily responsible for housing production in Mexico. Large investment companies, such as banks and insurance companies, also engage in construction, usually in higher income developments. Government agencies also subsidize and directly undertake a limited amount of construction of low-income developments.

Financing institutions and practices.--In Mexico, privately owned commercial banks provide most of the short-term credits. The largest two banks operate through a total of approximately 1,000 branches throughout Mexico. Many commercial banks also have set up affiliated investment banks to handle mortgages and other long-term loans.

Much of the financing of private housing construction, maintenance, repairs, and mortgage loans is done by the Institute of National Workers Housing Fund, which was established in 1972 to fulfill a section in the Mexican Constitution of 1917 that requires employers to provide sufficient housing for their employees. Employers must contribute 5 percent of each employee's salary to the Institute. Loans are available from the Institute to all employees, with an established account, at 4 percent interest. Low-income employees have priority to obtain such loans. After a loan is granted, the employer must deduct the loan expenses from the employee's salary.

The Bank of Mexico, the central bank, and the National Banking and Insurance Commission, in attempts to control inflation, have made credit relatively scarce and long-term interest rates high. Although no restrictions apply to the issuing of mortgage credit, only upper middle and higher income groups can afford to utilize these funds. Some authors

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1/ J. De La Vega, Mexican Real Estate--Law and Practices Affecting Private U.S. Ownership 15 (1976).

have characterized Mexico as difficult as any other place in the world to finance the purchase of income-producing property. U.S. lenders are not anxious to loan money on nonincome-producing property in Mexico to U.S. or non-U.S. persons, unless U.S. property is available as security.[2]

The law of immovable property.--The main body of real property law is contained in the Mexican Civil Code. In Book Two, entitled "Of Goods" (De los Bienes), is the classification of real and personal property, the treatment of possession, ownership, usufruct, easements, and prescription--including limitations of actions to enforce contracts.

In the Civil Code, property is classified into the two traditionally recognized categories of immovables (bienes immuebles) and personal property as movables (bienes muebles).[3]

The land register office (Public Registry of Property).--A conveyance of real property whose value exceeds 500 pesos must be executed in the form of a public document. All contracts which convey or modify ownership, possession, or enjoyment of property or rights in rem are required to be recorded in the Public Registry of Property, or they have no validity against third persons. After the deed is executed, the notary advises the registrar, who makes an annotation. If the deed is then filed for recordation within 1 month after execution, registration is effective from the date of annotation. Registration fees are based on the amount of consideration given in the transaction. Therefore, actual and not nominal consideration must be stated in the contract.[4]

Prior to leasing real property, one must register the property with the proper federal taxing office (Oficinas Federal de Hacienda) as a rental property as well as with the local, State, and city governments. The registration is to assure payment of Mexican income taxes on the profit a landlord obtains.[5]

Sale and transfer of real estate.--A sale generally is completed between the parties when they have agreed as to the object of the sale and the price, although neither has been delivered.[6]

Ordinarily, title to property is acquired by executing a purchase/sale contract (contrato de compraventa) transferring title.[7] However, a

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2/ Nat'l Assn. of Realtors, International Real Estate Markets--A Comparative Study of Selected Markets 122 (1978). See also Sutton, Acquisition of Real Property, Investment in Corporations, and Probate Law in Mexico, 10 Real Property, Probate and Trust J. 447, 449 (1975).

3/ De La Vega, supra note 1, at 21-24.

4/ 7 Martindale-Hubbell Law Directory 3774 (1979).

5/ Sutton, supra note 2, at 449-50.

6/ 7 Martindale-Hubbell Law Directory 3783-84 (1979).

7/ De La Vega, supra note 1, at 41.

U.S. person purchasing Mexican real estate, since he or she must first obtain permission from the Foreign Secretariat to purchase property, should use a contract of purchase/sale with reservation of title (compraventa con reserva de dominio). This contract is akin to the U.S. contract to convey or the installment contract, except the condition that must be fulfilled for title to be transferred is not the payment of the purchase price, but the approval of the Foreign Affairs Secretariat. This contract prevents the seller from alienating the property against third parties as long as the clause or clauses of contingency are recorded in the Public Registry.8/

Land use controls.--Strict zoning laws exist in Mexico and classify areas into residential, commercial, and industrial zones. A building permit is needed for new construction. The density of buildings, heights, architectural design, and protection of open space all are regulated by local government. To change a property use requires prior authorization. Obtaining permission to subdivide land for building purposes is difficult.

Expropriation law.--Ownership of real property rights in Mexico is more limited than fee simple ownership rights in the United States. The Mexican Constitution reserves for the Nation the right to limit private property rights due to public interest and to expropriate or confiscate property for the social benefit. Hence, the Mexican Government has broader power to expropriate than the U.S. Government.

Pursuant to the Civil Code, the Government can appropriate land and sell it to families for the establishment of homesteads or to provide lands for the construction of rental units for low-inome families at modest rents.

The Government, after indemnifying the owner, may occupy, deface, and even destroy private property if it is required to prevent or correct a public nuisance, to save a population from imminent danger, or to execute works of collective benefit.

Private property also can be expropriated by the Federal Government for distribution to a group of persons lacking communal lands and tenements (ejidos), for absence of proper granting instruments after legal alienation, or inability to identify the property.9/

Family law and rights in real property.--Matrimonial property in Mexico is governed by the Civil Code. There may be a separation of property or a conjugal property, which is similar to community property in the United States. Separate property can be absolute or partial. Separate property may be terminated and substituted by community property during

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8/ Id. at 41-42.
9/ Id. at 34-35.

the marriage. The agreement to have separate property need not be in writing before the wedding. However, separate property cannot be established after the wedding unless the transfer of property is evidenced by proper written instruments.

Conjugal or community property usually begins at matrimony. To create community property requires a public instrument transferring the ownership of the property brought into the community. The instrument also must be recorded in the Public Property Register. Any additional modifications to the agreement must be noted in the public register. Without these requirements, the modifications will have no legal effect against third parties.[10]

Descent and Distribution

Intestate and testate succession.--Intestate succession occurs under the following circumstances: there is no will or the will which was executed is void or has lost its validity; the testator does not dispose of all his property; the condition imposed on the heir is not fulfilled; and the heir dies before the testator, repudiates the inheritance, or is incompetent to inherit, if no substitute was designated.[11]

The right to inherit under intestate succession applies to the following persons: descendants, spouse, ascendants, collateral relatives within the fourth degree, and in some instances a concubine.

Near relatives take to the exclusion of the more remote relatives. However, if children and ascendants in a further degree remain, the former shall inherit per capita and the latter per stirpes. If brothers and nephews and nieces agree, sons of brothers or half-brothers predeceased who are not eligible to inherit or who may have waived the inheritance take, the former per capita and the latter per stirpes, and if brothers agree with half-brothers, the former take a double portion.

Relatives of the same degree inherit equally. An adopted son inherits like a son, but no right of succession exists between the adopted son and the relatives of the person adopting him.[12]

Acceptance of inheritance can be made expressly or implicitly. Repudiation must be in writing before a judge or by public instrument before a notary, if the heir is not in place where the proceedings occur. Neither acceptance nor repudiation may be partial or conditional. Every acceptance is made with benefit of inventory--on the condition that an

10/ Id. at 29.
11/ Mexican Civil Code, Art. 1599.
12/ Guerrero, Acquisition of Real Property, Investment in Corporations and Probate Law in Mexico: I 10 Real Property, Probate and Trust J. 427, 445(1975).

inventory be made of the estate and that the heir is not liable for debts beyond the amount of the inheritance.[13]

Wills.--The recognized wills in Mexico are ordinary or special. Ordinary wills are: public open, public closed, or holographic. Special wills are: private, military, or foreign.[14]

Foreign wills.--A will made abroad is valid if it is made in accordance with the laws of the country in which it is made. However, it is recommended that foreigners who have property and rights in Mexico make a will pursuant to the provisions contained in the Civil Code where the property or the rights are situated.

Mexican Secretaries of Legations, Consuls, and Vice-Consuls can serve as notaries or officials in charge of the Registry in the execution of wills of nationals abroad, if the testamentary provisions are to be carried out in the Federal District. U.S. persons making a will to be carried out in the Federal District also can probably obtain the assistance of these officials.[15]

Other Municipal Laws Relevant to Foreign Investment in Real Estate

Forms of business enterprise.--Ordinarily, foreign investors conduct business in Mexico through a company incorporated under the Federal laws of Mexico. Although foreigners can use different forms of business entities when they invest in Mexico, they are restricted in this regard when they invest in Mexican real estate.

Foreigners not merely investing in Mexican real estate should be aware of the different forms of organizations of business entities in Mexico, which are regulated by the General Law of Mercantile Organizations of July 1934 or the Civil Code. Most commonly used is the corporation (*Sociedad Anonima--S.A.*) and the corporation with variable capital (*Sociedad Anonima de Capital Variable--S.A. de C.V.*). The limited liability company (*Sociedad de Responsabilidad Limitada--S. de R.L.*) is used only in special situations. The general partnership (*Sociedad en Nombre Colectiva*) is not used often by foreign investors. The limited partnership (*Sociedad en Comandita--S. en C.*) is seldom used. A joint venture contract (*Asociacion en Participacion*) is available. A sole proprietorship (*empresa de persona fisica*) and a branch of a foreign corporation (*sucursal de sociedad extranjera*) are not often used by foreigners.[16]

13/ 7 *Martindale-Hubbell Law Directory*, 3774 (1979).

14/ *Id.* at 3789. *Also see* Guerrero, *supra* note 12, at 442-45.

15/ 7 *Martindale-Hubbell Law Directory* 3779 (1979); Guerrero, *supra* note 12, at 445.

16/ Price Waterhouse, Doing Business in Mexico 55 (1977).

Commercial register.--The Commercial Code requires that the corporate charter and its amendments, issuance of stock, and dissolution of commercial corporations be registered. Individual merchants are required to register documents relating to their capacity to do business and family documents concerning their estate.[17]

Laws regarding foreign investment.--Before discussing in some detail laws applicable primarily to foreign investors, this section describes the sources of law. Limitations under Mexican law regarding foreign investment have a basis under the Mexican Constitution. Section I of Article 27 states:

> Only Mexicans by birth or naturalization and Mexican companies have the right to acquire title to the lands, waters and their appurtenances or to obtain concessions to exploit the mines or waters. The State may grant the same right to foreigners, so long as they agree before the Ministry of Foreign Relations to consider themselves as nationals as respects said properties and to not invoke the protection of their governments for any matters concerning those properties; under penalty, in the event of breach of agreement, of forfeiting to the Nation the property which may have been acquired by virtue of said agreement. Within a zone of 100 kilometers along the borders and 50 of the shores, for no reason may foreigners acquire legal title to the lands and waters.

Mexico has approximately 6,300 miles of coastline and 2,400 miles of border. The prohibited areas consist of 45 percent of the territory of Mexico.[18]

In 1971, President Echeverria promulgated a decree reaffirming the constitutional restrictions on foreign acquisition of real property, but authorizing the Secretary of Foreign Affairs to allow national credit institutions to acquire title to real property in the prohibited zones in trusts created for the development of industrial and tourist activities along the frontier and shores. Under the decree, foreigners, while still not allowed to acquire legal title to the lands and waters in a prohibited zone, may acquire beneficial use of them.

In 1971, the new Agrarian Reform Law was enacted. It aims at strengthening the ejido, which is a social enterprise serving as a community for a large population. The law provides that only natural-born Mexican citizens can be members of ejidos and have the right to the endowment of a parcel of land--minimum 10 hectares (24.7 acres). The provisions of this law are incorporated into a permit which is required from the Secretary of Foreign Affairs for foreigners to acquire beneficial use of prohibited zone sites.

17/ 7 Martindale-Hubbell Law Directory 3783 (1979).
18/ De La Vega, supra note 1, at 16.

The Investment Law of 1973, a comprehensive foreign investment law, establishes the machinery of the trust for land investments. It also sets forth which industries are exclusively Mexican and limits foreigners to a maximum 49-percent share in most new ventures. The Law codified many of the rules concerning foreign investment which had been applied as administrative policies.[19]

The Investment Law of 1973.[20]--Foreign investment is defined as an undertaking by foreign individuals, juridical persons, or economic units without juridical personality, as well as by Mexican enterprises, the majority of whose capital is owned by foreigners or in which foreigners may be able to determine the management of the enterprise.[21]

The Investment Law of 1973 governs foreign investment in the capital and assets of enterprises. It also regulates real estate trusts for property situated on the border and in the coastal areas. Investments made by foreign individuals living in Mexico with the status of permanent resident (inmigrados) are considered equivalent to Mexican investments, except when the activities of the individual place him in the position of being related to a foreign decision-making entity. However, this provision does not apply in those geographic areas (e.g., in the border or coastal areas) or to economic activities that are reserved exclusively for Mexicans or for Mexican companies with an exclusion-of-foreigners clause, or that are the object of specific regulation.[22]

Activities prohibited to foreign investment.--The Law forbids foreign investment in certain activities reserved for the Government, such as petroleum and hydrocarbons, basic petrochemicals, radioactive minerals and the generation of nuclear energy, certain mining activities set forth in the mining law, and such other activities as may be provided in other laws. Other activities are reserved to Mexicans or to Mexican companies and ownership of their shares by foreigners is prohibited. Examples are land and waters within 100 kilometers of the borders and 50 kilometers of the coastline; forestry, distribution of gas, and such other activities as are set forth in other laws or in regulations promulgated by the executive.[23]

Activities in which foreign investment is allowed.--The Law sets forth activities or enterprises in which foreign investment is expressly allowed. These embrace the following: mining operations, up to 49 percent generally and up to 34 percent in national reserve areas, and such other areas promulgated by the executive, including agriculture.

19/ De La Vega, *supra* note 1, at 17-18.
20/ The English translation version of the law is in De La Vega, *supra* note 12, at Appendix A.
21/ Investment Law of 1973, Art. 2.
22/ Investment Law of 1973, Art. 6.
23/ *Id.* Art. 4.

If no laws or regulations provide for a definite percentage for a type of foreign investment, foreign investment will be allowed up to a maximum of 49 percent of the capital of business enterprises, so long as the foreign investors do not control the administration or the right to determine management of the enterprise. The National Commission on Foreign Investment may allow the foreigners to increase the maximum percentage of foreign capital if it believes that the higher participation will be beneficial to the economy of the country.[24]

Criteria by which the allowance of foreign investment is determined.--In determining whether to authorize foreign investment, and to establish the percentages and conditions by which such investment may occur, the National Commission on Foreign Investment must consider pursuant to the Law the following criteria and characteristics of the investment:

1. It should complement national investment.

2. It should not displace national enterprises which are operating satisfactorily, or be aimed at areas which are sufficiently covered by them.

3. The favorable effects which the investment may have on the balance of payments and in expanding exports.

4. Its effect on the employment rate.

5. The employment and training of Mexican technicians and management personnel.

6. The use of national inputs and components in the manufacture of their products.

7. The extent to which their operations are financed by foreign resources.

8. The diversification of the investment sources and whether the need to promote regional and subregional integration of Latin America is being fulfilled.

9. It should not occupy a monopolistic position in the national market.

10. The capital structure of the economic activity to be developed.

11. Its technological value and its contribution to technological research and development of the country.

12. Its effect on price levels and quality of production.

13. It should preserve cultural and social values of the country.

14. The relative importance of the activity in the national economy.

24/ Id. Art. 5.

15. The extent to which the foreign investor is identified with the interests of the country and his involvement with foreign centers of economic decision.

16. In general, the extent to which it complies in the obtaining of objectives and adheres to national development policy.[25]

Acquisition by foreigners of established enterprises.--To acquire more than 25 percent of the capital stock or 49 percent of the fixed assets of any existing enterprise, foreign investors or Mexican enterprises controlled by foreigners must obtain prior authorization. The rental of an enterprise or of the assets essential for its operation or the obtaining of the power to manage a company are deemed as acquisition of the assets. Such an authorization can be made only by the executive authority supervising the activity in which the enterprise is engaged, after consulting with the National Commission on Foreign Investment. The Commission has the power to make a prior offer of sale to Mexican investors for a period of 90 days before authorizing a sale to foreigners.[26]

The National Commission on Foreign Investment.--The Law created the National Commission on Foreign Investment, which is composed of the heads of the Departments of the Interior, Foreign Affairs, Treasury, Natural Resources and Industrial Development, Commerce, Labor, and the Presidency. The Commission has the responsibility of approving or rejecting foreign investment applications and deciding the percentages in which new investments may be made. It also approves foreign investment in new or existing companies (above 25 percent of capital or 49 percent of assets) or in new establishments, as well as the participation of existing foreign investment in new fields of economic activity or product lines.

The work of the Commission is conducted with the assistance of an executive secretary, a staff, and a subsidiary working committee, consisting of one representative of each member of the Commission, which reviews and prepares tentative decisions on the matters to be submitted to the monthly meetings of the Commission.

The Secretary of Foreign Affairs continues its previous role of issuing the required permits, although now on the basis of resolutions adopted by the National Commission on Foreign Investment, in the following circumstances:

1. The acquisition of real estate by foreigners.

2. The creation of real estate trusts in which foreigners may hold beneficial rights to property within the prohibited border and coastal zones.

25/ Id. Art. 13.
26/ Id. Art. 9.

3. The acquisition by resident foreign individuals of real estate and waters except in the border and coastal zones. Such permits do not need prior approval of the National Commission on Foreign Investment.

4. The creation and amendment of the charters of incorporation of companies.[27]

The National Registry of Foreign Investment.--The law created a National Registry of Foreign Investment under the Secretary of Industry and Commerce and managed by the Executive Secretary of the National Commission on Foreign Investment. Regulations which have been promulgated require persons or companies that must register to file applications within the month following the date on which they become subject to registration. The following information must be included in the registry:

1. Foreign physical persons or corporations which undertake investments regulated by this law.

2. Mexican companies whose capital is owned by foreigners, or Mexican companies controlled by foreigners.

3. Real estate trusts in which foreigners participate, and the purpose of which is regulated by this law.

4. Securities representing capital owned by foreigners or given to them as guarantee, and transfer of the same.

5. Decisions issued by the Commission.[28]

Requirement that foreigners hold only nominative shares.--To strengthen ability to obtain information on foreigners investing in Mexico, the law requires that certificates of capital stock of Mexican companies be nominative in the following cases:

1. They are owned by foreign persons or entities without juridical personality or Mexican companies controlled by foreigners.

2. Laws, specific regulations, or resolutions of the National Commission on Foreign Investment prescribe the proportions and manner of nominative shares. This provision apparently applies to variable capital companies--and if two series of capital stock must be issued, one may be owned only by Mexicans and presumably can still be issued to bearer, and the other may be held by other nationalities and is required to be nominative.[29]

27/ Price Waterhouse, *supra* note 16, at 28.
28/ Investment Law of 1973, Art. 23-24.
29/ *Id.* Transitory Articles; *see also* Price Waterhouse, *supra* note 16, at 28-29.

Real estate trusts on the borders and the coasts.--The law reiterates the essence of the Presidential decree of 1971, authorizing the establishment of real estate trusts for the purpose of enabling foreigners to use real estate for industrial or tourist purposes within the border and coastal zones of the country.30/

The Secretary of Foreign Affairs has the power to authorize the establishment of such trusts using the criteria and procedures set forth by the National Commission on Foreign Investment.31/

The duration of a real estate trust is limited to 30 years. Ownership of the real estate always resides in the fiduciary institution which is the trustee. The latter has the right to lease the property for terms not in excess of 10 years. Upon the expiration of the trust, the property may be conveyed to persons legally capable of acquiring it.32/

The law also requires that real property participation certificates issued, based on the trust, must represent for their beneficiaries only those rights set forth by the General Law of Negotiable Instruments and Credit Operations. In addition, the certificates must be nominative and nonamortizable.33/

The law also defines rights of the beneficiaries of the trust. It provides that the beneficiaries of the trusts have the right to use and enjoy the real property and the net profits from income and from the transfer of the real property.34/

The parties to the trust appear before a notary public and establish the trust in favor of the buyer or beneficiary (*fideicomisario*) on the terms set forth in the permit from the Secretary of Foreign Affairs and in the trust agreement.

Before the trust instrument is drafted, the seller must present a certificate of ownership, including encumbrances, from the Public Registry. The seller must produce evidence that the taxes and utilities are paid. A valid, up-to-date appraisal of the property must be made. The buyer must show the required permit from the Secretary of Foreign Affairs. After collecting the required documents, the parties to the trust agreement must appear before the notary public. The buyer (trust beneficiary) need not appear at the execution of the trust agreement, although it is recommended that he or she do so. Total initial bank and notary fees may amount to as much as 6 to 8 percent of the purchase price.

Prior to the expiration of the trust, the owner can sell his interest. If the new owner is a foreigner, the latter would obtain an interest in

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30/ Investment Law of 1973, Art. 18.
31/ *Id.* Art. 19.
32/ *Id.* Art. 20.
33/ *Id.* Art. 21.
34/ *Id.*

the property for whatever duration would be remaining on the original 30-year period. If the property were sold to a Mexican citizen, the trustee would give full ownership (title) to the buyer. The property must be sold to a Mexican citizen within 180 days of the expiration of the trust. Although the new buyer in theory may be another bank who would establish a new trust for the selling owner's benefit, permission for such a transfer probably would not be given by the Secretary of Foreign Affairs.35/

Penalties.--Companies which have failed, although required to be in the National Register of Foreign Investment, are not permitted to pay dividends. All acts not consistent with the law, as well as those of companies which are required but have failed to register, are invalid.

Substantial fines may be imposed against violators of the law. These fines can be levied on the individual administrators, directors, general managers, statutory auditors, and members of the vigilance committees. In addition, persons who misrepresent any act, as a result of which foreigners are allowed to benefit from the ownership or the disposition of shares prohibited to them or reserved specifically for Mexicans, are liable to corporal punishment and fines.36/

Currency restrictions.--The Banco de Mexico, S.A., the Government-owned central bank, has general supervision of the exchange markets and determines the rules which must be followed by Mexican banks in carrying out exchange transactions. No controls now exist or have in the recent past been imposed on remittances to foreign countries.

Mexico does not require direct investments in Mexico made in foreign currency to be registered. Hence, no proof of registration of having brought foreign currency must be shown at the time of making currency purchases with pesos. Transactions of more than U.S.$5,000 must be reported to the Bank of Mexico by the banks and brokers.37/

Taxation

Taxation law varies according the following three principal classes of taxpayers: resident individuals and Mexican citizens wherever they reside and nonresident foreign business enterprises and businesses.

Corporate taxation.--In general, all forms of business enterprises are subject to the same tax rules as corporations. Even economic units without a juridical personality, such as joint ventures, also may be considered as separate business taxpayers.

35/ De La Vega, supra note 1, at 38-45.
36/ Investment Law of 1973, Arts. 27-31.
37/ Price Waterhouse, supra note 16, at 21-22.

A tax is imposed, inter alia, on capital gains arising from sales of real estate constituting a part of fixed assets, unless a special exemption is obtained, and on mergers, liquidations, or reductions of capital stock of companies in which the taxpayer is a partner or shareholder.

The rate of taxation on corporations is graduated, with a maximum rate of 42 percent reached at Ps. 1.5 million.

A supplementary tax has been imposed since 1977 on extraordinary gross profits of business enterprises, except for income from Mexican sources of foreign corporations.

Enterprises engaged in agricultural, cattle, and fishing activities are subject to only 60 percent of normal business tax rates payable by corporate entities or 75 percent thereof, if they process their basic products.[38/]

Dividends or distributions of profits by all types of business enterprises incur a withholding tax. The tax is due at a flat rate of 15 percent on distributions on nominative shares held in Mexico, and 21 percent on bearer shares or nominative shares held by nonresidents or by residents who do not provide their Federal Registry of Taxpayers number to the paying company.[39/]

Taxation of foreign corporations and individuals.--Most forms of income received by foreign corporations or individuals from sources in Mexico are subject to tax on the basis of gross revenue received without allowance of deductions of any kind.

Interest income received by foreign credit institutions which are on a register kept by the Treasury Department are subject to tax on their interest income from Mexican sources at the flat rate of 21 percent. The interest paid to foreign companies other than registered institutions is subject to a flat rate of 42 percent. Interest income paid to nonresident foreign individuals is taxed at normal rates for individuals (up to 50 percent on annual income over Ps. 1.5 million) unless the Treasury Department considers the corresponding loan to be in the public interest, in which case it is taxed at a flat rate of 20 percent.

Income derived from rentals of real property located in Mexico is subject to the normal rates of tax on business enterprises, as contradistinguished from those applicable to resident individuals, applied to 70 percent of gross rental income. However, if real estate is beneficially held by a foreigner pursuant to a 30-year trust, the trustees must withhold and pay 17.5 percent of the gross rent as an advance payment of tax for the foreign owner.

Income realized by foreigners domiciled outside of Mexico on sales of securities issued in Mexico is considered as Mexican-source income, regardless of where the sale is realized, and is subject to tax at the

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38/ Id. at 93-108.
39/ Id. at 115-16.

graduated rates applicable to business income--which reach 42 percent on profits in excess of Ps. 1.5 million.[40]

Taxation of resident individuals.--All foreign individuals who are residents of Mexico are subject to Mexican income tax on their worldwide income, as are Mexican citizens, residents and nonresidents of Mexico.

In general, taxpayers are classified into two categories: those who are taxed only on their different types of income considered separately and those who are liable also for tax on their total income from all sources. Taxpayers whose total annual income is more than Ps. 100,000 must pay tax on their total income, whereas individuals whose total annual adjusted gross income from all sources is less than Ps. 50,000 must pay only on each type of income separately.

Gains realized by individuals from the sale of land and buildings are subject to a tax rate which diminishes with the length of time the asset is held. A maximum 50 percent reduction applies to property held for more than 10 years. The reduced taxable amount is referred to as the adjusted gain. The taxpayer, in determining the amount of net profits on a sale of real estate, may deduct losses on other sales made during the year or the previous 5 years, if not previously deducted. The tax which must be paid is considered as an advance payment, and the purchaser is jointly responsible for payment of this tax. Eighty percent of the tax is final, and 20 percent must be included in the annual tax return on income from proceeds of capital or on all personal income when the taxpayer is subject to tax on the overall income of individuals in order to determine the tax payable with the annual income tax return.

Rental income is liable to advance payments of tax at the rate of 5 percent. Seventy percent of the gross income from rents must be included in an annual income tax return, together with other personal income, if any. A deduction of 30 percent is permitted for depreciation, property taxes, maintenance, etc. In some cases, taxpayers may deduct the actual expenses incurred on income-producing property.

Gains realized from the sale of securities are subject to a tax on business income applied to each operation. However, gains on the sale of securities are not includable for purposes of the tax on the overall income of individuals. Buyers must withhold and pay within 15 days an amount equal to 20 percent of the purchase price as an advance payment of income tax for the account of the individual seller.

Personal income tax is payable at graduated rates of tax, which reach a flat rate of 50 percent when net taxable accumulated income exceeds Ps. 1.5 million for the year.[41]

International Agreements

No tax treaty or treaty of friendship, commerce, and navigation has been concluded between the United States and Mexico.

40/ *Id.* at 120-24.
41/ *Id.* at 135-42.

The Netherlands

Introduction to the Legal System

The Netherlands is a constitutional monarchy which was created in 1815. Its legal system is based on a civil code system derived from the Napoleonic Code.

Climate and Laws Governing Real Property

The real estate profession and its operation.--The Makelaar, the professional real estate agent, has a long tradition in the Netherlands. Since the 16th century, the world's oldest association of professional real estate agents, the Makelaarsveneniging te Amsterdam, has existed. Outside of Amsterdam, real estate agents are represented by the Nederlandes Bond van Makelaars in Onroerende. The two organizations belong to a nationwide organization, the Nederlandes Federatie van Makelaars in Onroerende Goerderen.

To practice as a real estate agent, a person must pass an examination given by the national federation under the supervision of the Ministry of Economic Affairs, and must agree to engage in no other business activity while he or she is licensed. Prior to taking the exam, an applicant enrolls in courses of instruction for about 2 years, during which time he or she may be employed in the real estate business only in clerical and nonprofessional positions.[1/]

Property is traditionally sold in the rural areas of the Netherlands by auction, although sale by private treaty is now becoming more common. In Amsterdam, the auction can be conducted only by the real estate licensee who represents the owner of the property and in the presence of a notary as the representative of the Government. The Dutch auction enables the seller to receive the best available market price. Outside of Amsterdam, only notaries can conduct the auctions, and either agents or principals can participate. The buyer pays the costs, including advertising and publicity, the notary fee, the premium to the highest bidder, brokerage fees, and registration (transfer) tax--in the aggregate from 10 to 15 percent to be added to the purchase price. Outside Amsterdam, a computerized exchange of listing information covering the remainder of the country has been established, with headquarters in Bilthoven, and it can be used by members of the national real estate organization.[2/]

The respective real estate organizations establish a schedule of fees and register them with the district court of the applicable area. Any changes must be approved by the Minister of Economic Affairs. The schedules contain the actual fees to be charged, not just the minimums,

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1/ E. Cosner, Real Estate--European Style 344 (1976).

2/ Id. at 345-46.

and are for the protection of the public against excessive rates as well as for the information of licensees.

Financing practices and institutions.--In the Netherlands, there are about 100 commercial banks, several of which participate in an international consortia of banks having worldwide connections giving them the opportunity to undertake extensive underwriting of securities.[3/]

Mortgage credit is available in the Netherlands primarily on a short-term basis. The commercial banks, although granting mortgages to their customers through their branches in the towns and villages, prefer to send applicants to affiliated mortgage banks.

The mortgage banks, which obtain funds both from time deposits and from issuing securities to the public, loan up to 50 percent of the value of property, up to a maximum of 70 percent, and for terms up to 25 years.

Savings banks make loans to their depositors and to others. They restrict loans to 50 percent of appraisal for up to 20 years.

The private and public pension funds and the life insurance companies are sources of real estate loans, although they tend to limit real estate loans to large commercial properties and new developments.

The postal savings system lends for both commercial property and for home construction.[4/]

Construction and construction costs.--Due to inflation, the Government has restricted commercial construction by requiring the acquisition of a national license prior to construction. In the area for which the restrictions are designed, namely the western industrialized areas, the permit must be obtained from the Ministry of Housing and Physical Planning at The Hague. Elsewhere, the issuing of the permit is delegated to the municipalities.

The strains on both the availability of skilled construction labor and of mortgage financing due to the rapid pace of construction of all types of facilities have caused the Government in some cases to delay granting the license mentioned in the above paragraph.[5/]

The law of immovable property.--The Dutch Civil Code makes the normal distinction of the Napoleonic Code system between immovable and movable property.

3/ *Id.* at 340.
4/ *Id.* at 350.
5/ *Id.* at 350-52.

The Land Register.--To be valid against third parties, conveyances must be recorded in the Land Register. The Land Register is maintained on a local level and contains a complete record of ownership, rights in rem (including life estate), and mortgages. In addition, it keeps maps and descriptions of parcels of land.6/

The role of the notary.--In the Netherlands and in most civil law systems, the notary has an important role in real estate transactions. Only the notary has authority to handle the transfer of title to real property and the registration of other legal documents. Their compensation is geared to the value of the transaction on a scale starting at about 1.5 percent and declining to a nominal percentage.7/

Family law and rights in real property.--Unless a matrimonial contract to the contrary is made, a community property system applies by operation of law. It distinguishes between (a) co-owned assets and joint liabilities, (b) separate assets and liabilities of the husband, and (c) separate assets and liabilities of the wife.

Each spouse has the right of administration and disposal of his or her own separate property and of assets which at the time of or during marriage went into community property.

Prior to or during the marriage, a matrimonial contract can be made. However, it is not valid unless it is executed before a notary and two witnesses in the form required by law.8/

Descent and Distribution

Intestate and testate succession.--If a decedent dies intestate, real property descends and personal property is distributed according to the same rules. Each of the following classes of which a member is living takes to the exclusion of subsequent classes: (1) The surviving spouse and children equally and the lawful descendants of deceased children *per stirpes* by representation; (2) parents and brothers and sisters of the deceased or their legitimate descendants, one-fourth to each surviving parent and the remainder equally among the brothers and sisters. If no parents survive, the brothers and sisters or their descendants take the whole. Other groups of descendants receive the estate in equal parts.9/

A Dutch person preparing his or her last testament is limited by law from disinheriting certain persons who are entitled to the following shares: (1) if there is only one legitimate child, one-half of the

6/ 7 Martindale-Hubbell Law Directory 3818 (1979).
7/ E. Cosner, *supra* note 1, at 349-50.
8/ 7 Martindale-Hubbell Law Directory 3806-07 (1979).
9/ 7 Martindale-Hubbell Law Directory 3803 (1979).

estate; (2) if two children, two-thirds; (3) if three or more, three-fourths; (4) if ascendants only exist, one-half; and if an illegitimate child, one-half of the intestate share of its mother's estate, and if acknowledged by the father, also of the father's estate. A testator can exclude the surviving spouse and the other heirs-at-law either by express provision or by omission.

In the Netherlands, there does not exist the common law trust mechanism. Therefore, testators making a testamentary trust to dispose of real property, as is common in Anglo-American estate planning, usually convert it into a similar, but not identical Dutch legal mechanism.[10]

Wills.--The main types of wills in the Netherlands are the notarial or public will and the mystic or closed will. In the latter type of will, the testator drafts the will himself and gives it, under seal, to a notary in the presence of four witnesses, stating that it is his last will. A notary then makes a protocol, written on the outer cover, and signed by the testator, the notary, and the witnesses.[11]

Other Municipal Laws Relevant to Foreign Investment in Real Estate

This section discusses two types of municipal laws which are relevant to foreign investment in real estate: forms of business enterprise and the requirement to register in the trade register.

Forms of business enterprise.--Several principal types of business organizations are recognized by the Netherlands Commercial Code. They are: (1) proprietorship (Eenmanszaak); (2) general partnership (Vennootschap onder firma); (3) limited partnership (Commanditaire Vennootschap); (4) civil partnership (Maatschap); (5) limited partnership with shares (Commanditaire Vennootschap op Aandelen); (6) cooperative (Cooperatie); (7) corporation (Naamloze Vennootschap or N.V.); and private company (Besloten Vennootschap met beperkte aansprakelijkheid or B.V.).

The business organizations most commonly used are the private firm or partnership for smaller enterprises, and the public corporation (N.V.) or private corporation (B.V.) for larger enterprises. Enterprises in which foreign capital is invested often use the N.V. or B.V.[12]

Trade register.--Persons undertaking an enterprise are required to file an application with the Chamber of Commerce of the district where the enterprise or branch is located for registration in the Trade Register of many details about the enterprise and its operator--such as the names

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10/ Id. at 3825-26.
11/ Id.
12/ U.S. Dept. of Commerce, Overseas Business Reports, OBR 78-30 at 24 (Aug. 1978).

of the operators, trade names under which the enterprise is operated, legal form in which the operator is organized, persons in management positions, etc.13/

Anyone who knowingly furnishes incorrect or incomplete data commits a crime punishable by imprisonment or a fine.14/

Laws Applicable Primarily to Foreign Investors

Substantive requirements.--In general, foreign nationals and enterprises are accorded the same treatment as Netherlands nationals in respect to engaging in commercial, industrial or financial activities--including the establishment of branches, formation of new companies, and acquisition of majority and even 100-percent interest in existing companies. There is no restriction against all members of the managing board of directors being nonresidents.15/

In the Netherlands commercial code, no specific provisions govern the status of foreign enterprises located in that country. Their status is the same as enterprises wholly owned by Dutch citizens. No provisions require a ratio of Dutch to foreign capital in a company. In fact, a company can be wholly foreign-owned. No distinction exists between Dutch and foreign companies with respect to either the private or public issuance of shares.16/

Procedural requirements.--A nonresident alien, prior to making a direct investment in a new industrial business or to purchasing in whole or in part an existing business (other than by purchase of stock on the Amsterdam Stock Exchange), must obtain an exchange license from the Netherlands Bank.

A nonindustrial enterprise such as a sales office or service organization must apply directly to the Netherlands Bank. An industrial enterprise must first obtain the approval of the directorate-general for industry and trade of the Ministry of Economic Affairs.17/

A U.S. person acquiring nonincome-producing property in the Netherlands is not required to report or obtain approval, except for exchange control purposes, if such person is using foreign currency.

Investment incentives.--Investment incentives are given by the Dutch Government to support job-creating investments and to foster industrial

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13/ Trade Register Act of July 26, 1918, as amended.
14/ *Id.* secs. 33-35.
15/ 7 *Martindale-Hubbell Law Directory* 3805-6 (1979).
16/ U.S. Dept. of Commerce, *supra* note 12, at 22.
17/ Price Waterhouse, Doing Business in the Netherlands 5-6 (1975).

development in certain areas of the country. New industrial enterprises including foreign entities may obtain up to 25 percent of the capital expenditure on fixed assets, such as the cost of land and the acquisition of buildings and machinery.[18]

Currency restrictions.--Foreign exchange control was introduced in the Netherlands in 1945. Any transaction by which the rate of exchange may be influenced is prohibited unless a prior permit has been obtained. Many exemptions may be granted by general license, subject, however, to certain conditions contained in the license. For instance, interest on loans and contractual amortization of the same to nonresidents are transferable, provided the loan was concluded in accordance with a permit. A nonresident wanting to invest in share capital of a Netherlands company must obtain a permit, after which dividends and proceeds from a liquidation are transferable and, if the amount of proceeds has been fixed in accordance with good business practices, invested capital also is retransferable.[19]

Internal and external financing.--Since the middle of July 1972, borrowing from foreign sources for domestic purposes has been forbidden.

Loans can be obtained by a foreigner from a Dutch source for an investment in the Netherlands. If an exchange license has been obtained prior to obtaining the loan, the related interest and capital repayments are transferable outside of the Netherlands.[20]

Taxation

Individual income tax.--An individual income tax is imposed by the state. No additional taxes on income or capital are imposed by local governments.

Individuals resident in the Netherlands are subject to individual income tax on their total world income.[21]

Individuals not resident in the Netherlands are liable to individual income tax on their net income from certain specified sources in the Netherlands, including immovable property, mortgages on immovable property, a "substantial interest" in a Dutch company, and a business through a permanent establishment.[22]

18/ U.S. Dept. of Commerce, *supra* note 12, at 5, 23.
19/ 7 *Martindale-Hubbell Law Directory* 3805 (1979).
20/ Price Waterhouse, *supra* note 17, at 3-4.
21/ *Id.* at 33.
22/ *Id.* at 36.

Corporate tax.--Net profits of resident corporations (firms incorporated under Dutch laws) are subject to a corporate income tax. Net profits of nonresident and foreign corporations are taxable to the extent they are earned within the Netherlands and are attributed to a permanent establishment situated in the Netherlands.23/

The tax rates applicable to the various levels of corporate income are as follows--45 percent on taxable profits of Dfl. 40,000 or less; 45 percent plus 15 percent on the excess over Dfl. 40,000 in profits of Dfl. 40,000 to 50,000 and 48 percent on profits of over Dfl. 50,000 ($20,000).

Deductions for depreciation can be taken for buildings, plant, machinery, equipment, good will and intangible property, but not for land. However, land and a building constructed on it can be treated as one asset for depreciation purposes, thereby increasing both the basis for depreciation and the salvage value.

An investment allowance can be applied against depreciable assets, except for a dwelling house, securities, and land not used for industrial business purposes. The amount of the investment allowance taken is chargeable against taxable income without reducing the depreciable basis of the asset.24/

Taxes on immovable property.--A ground tax (grondbelasting) and certain other minor taxes of a regional nature are imposed on real estate. Since the ground tax is imposed on the annual rental value of property as determined in the latter part of the 19th century, the amount of the tax is therefore relatively small.25/

Transfer tax on immovable property.--When immovable property located in the Netherlands is acquired, the transaction is subject to a 5-percent transfer tax payable on the market value. The tax also is imposed on the acquisition of shares in an immovable property company if the assets of such company consist primarily (70 percent or more) of immovable property and if through the company the acquirer has a major interest in the company.

An immovable property company is a company which trades in or operates real estate. A company which no longer conducts business but retains immovable property can qualify as an immovable property company.

An acquirer is exempt from a transfer tax in the following circumstances:

(1) The transfer of the property is subject to a turnover tax. However, no exemption applies if the transferor has used the property for business

23/ U.S. Dept. of Commerce, supra note 12, at 27.
24/ Id.
25/ Price Waterhouse, supra note 17, at 30.

purposes and the transferee can recover the turnover tax in full or in part.

(2) The property constitutes part of a business which is transferred to a company against the issuance of shares.

(3) An internal reorganization of companies within a group occurs.

The acquirer should capitalize the transfer tax as part of the cost of the company.[26]

Individual capital (wealth) tax.--Individual residents are subject annually to a tax on their net capital. Relief is given for certain net assets if they are subject to a foreign capital tax or if the income therefrom is subject to a foreign income tax. Taxable capital consists of the aggregate value of the taxpayer's net assets including real property.

Individuals not resident in the Netherlands are liable to capital tax on certain assets within the Netherlands, less the liabilities relating directly thereto, including: immovable property; claims secured by a mortgage on the property; and a business or profession.[27]

The rate of the capital (wealth) tax is 0.8 of 1 percent.[28]

Inheritance and gift tax.--Resident and nonresident heirs-at-law and beneficiaries under a will, whether citizens or aliens, are subject to a tax on all the benefits, wherever situated, which they receive from the estate of a resident decedent. The tax liability applies without regard to the latter's nationality or of a nonresident decedent of Dutch nationality who at any time in the 10 years preceding his death has been a resident of the Netherlands. Tax is imposed at a progressive rate according to consanguinity and to amounts received. A decedent who does not reside in but (1) owns real estate located in the Netherlands, (2) owns other property belonging to a trade or profession carried on by the dececent in the Netherlands, or (3) has a claim secured by a mortgage on real estate in the Netherlands is subject to a tax of 6 percent *ad valorem* on the transfer of such property or the claim to the heir and beneficiaries.[29]

26/ *Id.* at 30-31.
27/ *Id.* at 38-39.
28/ Cosner, *supra* note 1, at 354.
29/ 7 *Martindale-Hubbell Law Directory* 3824 (1979).

International Agreements

Convention of Friendship, Commerce, and Navigation.-- This discussion of the U.S.-Netherlands Convention of Friendship, Commerce, and Navigation[30] covers eight topics, as follows:

(1) Leasing and acquiring land. U.S. nationals and companies have a right to national treatment in the Netherlands with respect to acquiring by purchase, lease, or otherwise and with respect to owning, occupying, and using land, buildings, and other property. However, a U.S. person or company domiciled or incorporated in a U.S. State which restricts investments in land by Dutch nationals (e.g., Minnesota) has only such rights in the Netherlands as are given Dutch nationals in their respective State.[31]

(2) Disposing of property. U.S. nationals and companies have a right to national and most-favored-nation treatment in disposing of property of all kinds.[32]

Dutch subsidiaries of U.S. companies must receive national treatment with respect to acquisition, ownership, use and disposition of property of all kinds in the Netherlands.[33]

(3) Estate and inheritance of or succession to property. U.S. nationals and companies have a right to national treatment in the Netherlands in connection with acquiring property of all kinds by testate or intestate succession. If they are ineligible to continue to own such property by reason of their alienage, they must be given a reasonable time to dispose of such property.[34]

(4) Expropriation of property and right to compensation. Property of U.S. nationals and companies cannot be taken in the Netherlands without the prompt payment of just compensation.[35]

The Netherlands is not to take unreasonable or discriminatory measures that would impair the rights or interests within its territories of U.S. nationals and companies, including specifically with respect to their property.[36]

The Convention authorizes the Dutch Government to impose special formalities on U.S.-controlled enterprises in connection with their

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30/ March 27, 1956, 8 U.S.T. 2043; T.I.A.S. No. 3942; 285 U.N.T.S. 231.
31/ *Id.* Art. IX(2).
32/ *Id.* Art. 5.
33/ *Id.*
34/ *Id.* Art. IX(4).
35/ *Id.* Art. VI(4).
36/ *Id.* Art. VI(3).

establishment in the Netherlands, provided these requirements do not impair substantive rights.37/

(5) Judicial remedies. U.S. nationals and companies are accorded national treatment with respect to access to the courts, administrative tribu-nals, and agencies in the Netherlands. Further, U.S. companies not engaged in activities within the Netherlands have a right to access in the Netherlands without any requirement of registration or domestication.

(6) Internal Taxation. U.S. nationals and companies residing in the Netherlands may not be subject to taxes, fees, or charges imposed on income, capital, or transactions which are more burdensome than those borne by Dutch nationals and companies.38/

(7) Currency exchange. U.S. nationals and companies have right to both national and most-favored-nation treatment with respect to payments, remittances, and transfers of funds between the United States and the Netherlands and between the Netherlands and a third country.39/

(8) Applicability of the convention to territories of the contracting parties. The Convention expressly provides that it is applicable to territories of the contracting states, and specifically to the Netherlands Antilles and Surinam.40/

Tax treaty between the United States and the Netherlands.--U.S. citizens, residents, and corporations can obtain benefits under the U.S.-Dutch convention for the avoidance of double taxation, as follows:

The Convention provides that income of U.S. persons from real property in the Netherlands is taxable only in the Netherlands.

Dividends paid to a U.S. parent corporation by its Dutch subsidiary are subject to a withholding tax rate which cannot exceed 5 percent, provided that during the portion of the taxable year preceding the date of payment and during the whole of the prior taxable year (if any), the U.S. recipient corporation owns at least 25 percent of the voting stock of the paying corporation, either alone or together with another corporation of the same state, provided each recipient owned at least 10 percent of the voting stock of the Dutch company. A further requirement to obtain the 5-percent withholding rate is that (1) not more than 25 percent of the paying corporation's gross income for the prior taxable year (if any) consisted of interest and dividends (other than interest) derived from the operation of a banking, insurance, or financing business, and dividends or interest received from subsidiary corporations; or (2) the paying corporation owned 50 percent or more of the voting stock at the time such dividends (or interest) were received. The

37/ Id. Art. VII(3).
38/ Id. Art. XI.
39/ Id. Art. XII.
40/ Id. Art. XXIV.

reduced withholding rate does not apply, however, if the U.S. recipient of dividends has in the Netherlands a permanent establishment with which the dividends are effectively connected.[41/]

An advantageous aspect of the U.S.-Dutch tax treaty is that interest on bonds, notes, debentures, securities, deposits, or any other form of indebtedness, including interest from mortgages and bonds secured by real property in the Netherlands paid to a U.S. resident or corporation is exempt from Dutch tax.[42/] Royalties received by U.S. persons also are in principle exempt from Dutch tax under the treaty.[43/]

41/ Id. Art. VII.
42/ Id. Art. VIII.
43/ Id. Art. IX.

Saudi Arabia

Introduction to the Legal System

Saudi Arabia is 1 of 10 countries in the world which does not have a modern constitution. The starting point of Islamic law in Saudi Arabia is the Shariah. Islam is not only a religion, it also is a political system. Islamic law, as distinct from Western law, is a system of rules that are enforced but not created by the sanction of the state. In Islam, the law of God is the law even if no one enforces it, or even if certain portions are unenforceable. In practice, the state may enforce much that is not consistent with the Islamic law.1/

The Shariah is much more than law. It is "the whole duty of man"--a code setting forth duties, moral theology, spiritual guidance, hygiene, social deportment, and courtesy.

The Shariah is based on five sources: (1) The Quran (Koran) is the book God revealed to the prophet Muhammad. It includes about 500 texts set forth by the Prophet, 80 of which have a legal nature. These texts have been construed by a form of statutory interpretation to derive maximum guidance from them. The nonlegal texts of the Koran contain moral exhortations and divine promises. (2) The Shariah are words and deeds of the Prophet Muhammad which complement and explain the teachings of the Koran. (3) The Qiyas is an analogy of the Koran and the Sunnah to new problems not specifically stated in either source. The Qiyas was considered to be rules perceived by reasoning from analogy. (4) The Idjma is a consensus by the Ulama who are the learned Muslims in religious and juridical matters. (5) The Idjithad is the use of independent reason and enlightened judgment within the Islamic context on issues and problems which have no analogy in the Koran or the Sunnah.2/

In Saudi Arabia and other Islamic countries, differences exist between the traditionalists and the modernists as to their respective understanding of the essence and the role of the Shariah in the Islamic society. On the one hand, the traditionalists believe that the Shariah is immutable, and, therefore, they often oppose human enactments, which may undermine Islam. On the other hand, the moderates among the modernists believe that Islam and its Shariah have the objective of providing viable sociopolitical institutions which must serve man at all times and in all places. They believe that because three-fifths of Shariah--namely the Qiyas, Idjama, and Idjithad--are human-created, the Shariah must be a viable instrument for man's development and progress. They believe

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1/ A. Shakir, Saudi Arabia, in A. Balustein & G. Planz, Constitutions of the World (March). Other useful introductory essays on Saudi Arabian law can be found in P. Hart, Application of Hanbalite and Decree Law to Foreigners in Saudi Arabia, 14 Geo. Wash.L.R.; Note, Law and Lawyers in Saudi Arabia, 14 Int'l & Comp.L.Q. 1034 (1965).

2/ Id.

that, although the Koran and the Sunnah are immutable, their interpretation is subject to change according to man's knowledge and experience through the ages.[3]

Although the King in Saudi Arabia has almost always had a dual capacity as head of state and head of the Government, his authority has not been absolute, since he has been required to have a consensus of influential members of the royal family and, to some extent, that of the Ulama and the notable tribal chiefs throughout the country.[4]

In the 19th century, a major legal reform, known as the Tanzimat, occurred throughout the Ottoman Empire to which Saudi Arabia belonged. During 1869-76, the Shariah was codified according to the teachings of the Hanbali School. The result was the Majalla, which sets forth in a series of articles the law of contracts and of civil procedure. In 1877, this body of law was enacted as the Ottoman Civil Code.[5]

Islamic Hanbali law is not only considered the basic law of Saudi Arabia, but it is the only law. In this connection, administrative regulations issued by royal decree can only supplement the rules of Islamic law, but they never contradict it. Islamic law is characterized by giving priority to the rights of the individual, the sanctity of contracts, and the sanctity of private property.[6]

Laws Governing Real Property

Islamic law is characterized by its respect for private property, both in relations among private persons and to those with the state. An example of this respect is that in the 8th century, Abu Yusuf, writing a treatise under order from Caliph Harun al-Rashid on revenue and other matters, stated that the head of the Muslim state does not have the authority to give as a concession to anyone that which belongs to a Muslim or to a protected person, or to deprive them of anything which they possess, unless he has a claim against them, and in such a case, may exact from that to which he has the right.[7]

Under Islamic law, the confiscation of private property is not recognized. Muwaffaq al-Din Ibn Qudama, author of one of the most authoritative handbooks of the Hanbali school, stated that if the head of state is unable to collect the zakat (tax) from one who acknowledges his duty to pay, or from one who has dishonestly concealed the amount of his property, the head of state can mete out discretionary and essentially

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3/ Id.
4/ Id.
5/ D. Suratgar, The Development of the Legal System of the Middle East: Islamic Law and the Importance of Civil Law to the Process of Modernization, in An Introduction to Business Law in the Middle East 7 (B. Russell ed. 1975); see also Schact, Islamic Law in Contemporary States, 8 Am.J. of Comp. L. 134 (1959).
6/ Schact, supra note 5, at 138.
7/ Id.

corporal punishment, which includes neither fines nor confiscation, but which is equal only to the amount of the _zakat_ due.[8]

Expropriation or the compulsory sale of land in the public interest is substantially restricted. It can occur to enlarge a Friday mosque, a public road leading to it, or a cemetery, etc. The state must pay the full estimated value for expropriated land.[9]

The sanctity of property under Islamic law was reflected in 1950 in the difficulties confronting the Saudi Arabian Government when it by decree introduced an income tax on all income or profits of Muslims of Saudi Arabia, except from animals and crops. Since such a tax is not in accordance with Islamic law, another decree was promulgated a few months later restricting the validity of the income tax decree to individuals and companies not of Saudi Arabian nationality. The latter decree limited the collection of tax from individuals and companies of Saudi Arabian nationality to the taxes due under Islamic religious law.[10]

Muslim jurists did not develop a cohesive theory of property rights, but did enunciate basic principles. According to the classical jurists, a thing, in order to be owned, must have the following attributes: it must have some value; it must be capable of ownership; and its use must be permitted. Hence, something that has no value or is common to all or is forbidden to Muslims (e.g., wine and pork) cannot be owned. The classical jurists did not agree on the question of whether non-Muslims could own wine or pork.[11]

The _Majalla_, as in classical Islamic law, includes in owership both the right to a thing and the right to certain uses of the thing, such as usufruct or an easement. This differs from Roman law, under which usufruct was not a form of ownership, but rather an interest _sui generis_.[12]

The _waqf_ is an important institution in Islamic law and is somewhat analogous to a trust mechanism in Anglo-American law. The _waqf_ is the allocation of some piece of property to charitable or pious purposes. The person establishing the _waqf_ loses his ownership in the _waqf_ property. The property cannot be alienated either by the former owner or by the administrator of the _waqf_.

A _waqf_, unlike a trust, is established in perpetuity and is irrevocable. While _waqf_ property cannot be alienated, it can be leased, although ordinarily only for limited periods to avoid circumventing the principle of inalienability through excessively long leases.

8/ However, the procedure of _musadara_, under which dismissed officials suspected of having enriched themselves through their office had their property confiscated, departed from the sanctity of private property. _Id._ at 141.

9/ _Id._

10/ _Id._

11/ Liebesny, The Law of the Near and Middle East 223-25.

12/ _Id._ at 223-24.

Because a waqf can be designated for certain beneficiaries, it can be used to avoid the limitations of the Islamic law of inheritance, such as the restrictions on disposition by will to one-third of the estate. A waqf also can help in avoiding the excessive fragmentation of property brought about by the Islamic inheritance law. However, under the rules of perpetuity and inalienability, waqf property is forever withdrawn from commerce and can, therefore, burden economic development, especially land reform.

Two types of waqf exist: a charitable waqf is devoted to the endowment of a permanent charitable or pious instituiton; a descendants' of family waqf is designated to provide support for certain descendants of the waqf before being assigned to a charitable purpose.13/

Municipal Laws Applicable Particularly to Foreign Investors

Laws concerning the ownership and use of real estate.--Non-Saudis are not allowed to acquire real property in Saudi Arabia except by inheritance. However, some exceptions to this rule are set forth in Royal Decree No. M/22 of September 13, 1970, as follows:14/

(1) Diplomatic missions and international organizations may acquire their premises;

(2) Foreigners may own the right of property in agricultural land, according to the regulations of the distribution of arid lands;

(3) Foreign institutions may own real property for business and housing for their employees, in accordance with the provisions of the foreign investment regulations; and

(4) Non-Saudis may own real estate used for dwellings or businesses. However, all of these exceptions require the permission of the ministries in charge. For the last exception, Royal approval is required. Attempts to obtain further information on how the exceptions operate in practice and what criteria are used in exercising discretion to grant an exception were unsuccessful. Dr. Hakim of the Near Eastern and African Law Division of the Library of Congress reports that no criteria govern the exercise of the discretion. In addition, it was not possible to obtain an English version of regulations on the distribution of arid lands (except as mentioned above).

13/ The above information of the waqf is derived from Liebesny, supra note 11, at 226.

14/ Library of Congress, Survey of Restrictions that Nations Place on Landownership by Nonresidents, in Staff of Sen. Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess. Foreign Investment in Agricultural Land 211, 212 n.8 (Comm. Print 1979).

Municipal laws applicable to foreign investors in Saudi Arabia.--Saudi Arabian law precludes a foreign company from establishing branches, agencies, or representative offices or from issuing or offering any financial securities for sale or subscription in Saudi Arabia, except pursuant to a license issued by the Trade and Industry Minister. Once a licence is obtained, the branches, agencies, or offices of a foreign company are governed by Saudi Arabian laws pertaining to the kind of activity undertaken. If a branch, agency, or office of a foreign company carries on activities before fulfilling the laws applicable to foreign companies, the persons carrying on such activities are jointly and severally liable.15/

Since Royal Decree No. M/22 of September 11, 1970, provides that foreign institutions may own real property for business and housing for their employees in accordance with the provisions of the foreign investment regulations, these regulations are highlighted.

Under the code, foreign capital is defined as money, bank notes, commercial papers, machinery, equipment, spare parts, raw materials, products, means of transport, and rights such as patents, trademarks, and similar values while they are foreign--if owned by a natural or juristic person who is not a Saudi national.

Foreign capital which may be invested in Saudi Arabia is limited to projects for the economic development (other than oil and mining industries, which are subject to special laws) of Saudi Arabia, and to projects which are licensed by the Minister of Trade and Industry, upon the recommendation of the Committee for the Investment of Foreign Capital.

An application for a license to invest foreign capital must be submitted to the Office of Foreign Capital Investment at the Ministry of Industry and Electricity. Each application must be submitted on the form prepared for that purpose, which contains such particulars as may be deemed necessary by the Minister of Industry and Electricity.16/ The applicant also must submit documents supporting the particulars contained in the application.

A Committee for the Investment of Foreign Capital has been established at the Ministry of Industry and Electricity to review all applications and to make appropriate recommendations. The Committee originally consisted of the following: the Deputy Minister of Commerce; a representative of the Ministry of Agriculture; a representative of the Ministry of Petroleum and Mineral Resources; a representative from the Supreme Planning Board; and the Director General of Industry and Electrical Affairs of the Ministry of Commerce and Industry.17/ However, the

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15/ Art. 228, Companies Law, N. Karam (translator), Business Laws of Saudi Arabia.

16/ Investment of Foreign Capital Regulations, in Business Laws of Saudi Arabia, supra note 15.

17/ Art. 5. See also Nazer, Doing Business in Saudi Arabia, Wickersham et al., Current Legal Aspects of Doing Business in the Middle East 116, 119 (ALI-ABA, 1977).

Committee has been expanded to about eight government officials. If an applicant meets all requirements, the Committee recommends to the Ministry of Industry and Electricity that the license be issued, and the Minister (by a ministerial decision) issues the license.

The code provides privileges for foreign capital when it is combined with 25-percent Saudi capital: protection against competition, exemption from customs duties, and a tax holiday for 5 years. A decree promulgated in 1979 exempts foreign enterprises investing in agricultural projects from income tax for 10 years.[18/] After the Minister of Industry and Electricity issues a decision in favor of an applicant having a joint venture with a Saudi businessman, the articles of association and memorandum of association are presented to the Ministry of Commerce. These are reviewed by the Ministry to ensure that they comply with the Company Regulations of 1965.[19/]

The following types of business enterprise are allowable in Saudi Arabia pursuant to the Regulations of Companies Act: joint-liability partnership, mixed-liability partnership, mixed-liability partnership by shares, limited-liability partnership, variable-capital partnership, joint-stock company cooperative company, foreign company, and joint venture. However, it has been reported that most companies (approximately 90 percent of the companies and joint ventures) which have been established in recent years are in the form of a limited liability company, also referred to as a private shareholder's company. Its members can range from 2 to not more than 50. It has limited liability and cannot issue shares to the public.[20/]

To form a company, a memorandum of association must be approved by the Ministry of Commerce. After approval, the Ministry of Commerce writes to the notary public of the town in which the headquarters of the company is located and requests the notary to notarize the memorandum of association. To complete the notarization, the foreign representative and the Saudi partner, if there is one, must appear in person, or have proper representation before the notary public. The articles must then be published in the Official Gazette for the company to be protected against third parties. After the articles are published and the minimum capital required (50,000 rials) is deposited, a license is issued.[21/]

Saudi Arabia has a mineral code with which prospective foreign investors must comply. The Ministry of Petroleum and Mineral Resources is responsible for investments in oil and mineral resources. No new companies are likely to obtain oil concesssions in Saudi Arabia. Instead, a local public organization is securing them.[22/]

18/ The modified Royal Dec. #M/4, Off. Gazette 2757 of Jan. 26, 1979.
19/ Investment of Foreign Capital Regulations, _supra_ note 15.
20/ Price Waterhouse, Doing Business in Saudi Arabia 23 (1975).
21/ Nazer, _supra_ note 17, at 119-20.
22/ _Id_. at 122.

Saudi Arabia imposes limited regulations and controls on foreign exchange in Saudi Arabia. Ordinarily, foreign capital is transferable. However, under certain conditions, repatriation of profits and capital invested in Saudi Arabia may be allowed in gradual stages. However, after 8 years of operation, all capital and accumulated profits can be transferred in the original currency or in any currency approved by the government. No other restrictions are imposed on the movement of foreign exchange. Although repatriation of capital, profits, and earnings is allowed, no assurances are given against inconvertibility.[23/]

Inheritance and Succession Laws

Saudi Arabian inheritance law is based on classical Islamic law, which emphasizes intestate succession.[24/] It is characterized as resulting in joint property and fragmentation of agricultural holdings. In classical Islamic law, the heirs are divided into two major categories: those who have a right to share (the sharers) and those who take the remainder (the residuaries).

In pre-Islamic Arabia, a purely agnatic system of inheritance existed (an agnate is a person who is related to the decedent through male links only) whereby the heir ordinarily was the nearest agnate. Hence, women, cognates, and minors were excluded. Islam initiated the assignment of definite shares to certain female relatives and to ascendants. Under this system today, the sharers first receive their share and then the remainder of the estate goes to the nearest agnate.[25/]

Two significant aspects of Islamic law of inheritance are: disposition by will is restricted to one-third of the testator's estate, which is known as the disposable third; and the estates are distributed *per capita* and not *per stirpes*.

Islamic law on intestate succession has as its source the Koran and the writings of jurists. Islamic law sets forth detailed and complex rules for the shares to be received by the various relatives of the decedent.

The Koran sets forth two types of heirs--the sharers and the residuaries. The sharers are: the husband; the wife; the daughter; the daughter of a son, however far removed in descendence; the father; the mother; the true grandfather, however far removed; the true grandmother, however far removed; the full sister; the consanguine sister; the uterine brother; and the uterine sister.

The shares of some selected sharers (selected for purposes of illustration) are as follows:

23/ Price Waterhouse, *supra* note 20, at 12.

24/ For a comprehensive account of modern Islamic law of inheritance, *see* J.D. Anderson, *Recent Reforms in the Islamic Law of Inheritance*, 14 Int'l & Comp.L.Q. 349-65 (1965).

25/ Liebesny, *supra* note 11, at 174-75.

(1) Husband--one-quarter if there is a child or a son's child no matter how far removed; one-half if there is no such child;

(2) Wife--one-eighth; if there are several wives, they take one-eighth collectively, to be divided equally among them. One-eighth is received if there is a child or son's child no matter how far removed; if there is no such child, the share is one-quarter.

(3) Daughter--one-half; if several daughters, they take two-thirds collectively. These shares apply if there is no son. If there is a son, daughters take as residuaries.

Residuaries or agnatic heirs.-- As noted earlier, an agnate is a person who is related to a decedent through male links only, and includes such persons as the son, the son's son, but also the son's daughter, the father, the father's father, and so forth. The residuaries can be divided into descendants, ascendants, and collateral relatives. Among the latter are included not only brothers and sisters of the descendent, but also the paternal uncle, both full and consanguine, and his son and remoter descendants.

In Saudi Arabia, only one-third of an estate can be disposed of by will.[26]

Taxation

In Saudi Arabia, the main taxes are income tax, *zakat*, and *jihad*. Only foreign companies and certain foreign individuals must pay the income tax while only Saudi citizens and companies must pay the *zakat* and *jihad*.

Taxable income in Saudi Arabia includes: (1) total personal income or any income accruing from capital investments of non-Saudi individuals; (2) the profits of non-Saudi corporations which carry on activities inside Saudi Arabia only or both inside and outside Saudi Arabia; and (3) the profits distributed to non-Saudi individuals by corporations comprised of Saudi and non-Saudi members.[27]

The tax rate on personal income and the net income on profits realized from capital investments is as follows:

-- 5 percent on that part of the total income exceeding the exemption limit, but not S.R. 16,000;

-- 10 percent on that part of the total income exceeding S.R. 16,000, but not S.R. 36,000;

26/ The bulk of the above information on Saudi Arabian inheritance and succession law is derived from Liebesny, *supra* note 11, at 180.

27/ Art. 10, Income Tax Laws, Business Laws of Saudi Arabia, *supra* note 15.

-- 20 percent on that part of the income exceeding S.R. 36,000, but not S.R. 66,000;

-- 30 percent on that part of the income exceeding S.R. 66,000 shall not be chargeable; any income accruing to an individual from the investment of his funds in any company is such income and shall have already been charged to the tax imposed on the profits of the company.[28]

It is not known whether foreigners are allowed to profit on their ownership of real estate (especially since they can only own real estate to which government exemptions are given).

Zakat.--Pursuant to provisions of the *Shariah*, *zakat* is imposed on property and income and is paid by Saudi citizens and companies. Citizens of the Gulf States are treated as Saudis.[29]

Petroleum companies are taxed at a special rate of income tax.

Treaties in Force in Saudi Arabia

Two agreements are in force between the United States and Saudi Arabia which affect investment by U.S. persons in foreign real estate:

U.S.-Saudi Arabian Agreement on Guaranteed Private Investment.[30]--The Agreement states that, to increase participation by U.S. private enterprise in projects bringing new technology to Saudi Arabia, persons eligible under applicable U.S. legislation may be issued guaranties by the U.S. Government against loss due to specified risks relating to contracts or investments in Saudi Arabia which are approved by the Government of Saudi Arabia. Presumably, such investments may include income-producing property. The Agreement provides, however, that a contract or investment shall be deemed approved for purposes of this Agreement only if entered into with the Government of Saudi Arabia, or an agency thereof, or otherwise approved in accordance with the applicable laws and regulations of Saudi Arabia.[31]

The Agreement provides that the Government of Saudi Arabia, with respect to guarantees given pursuant to the Agreement, the Overseas Private Investment Corporation, or any other similar public agency of the U.S. Government which has made payments pursuant to such guaranties or has received assignments in connection therewith, will be recognized as succeeding to the rights of the guaranteed person or firm.[32] The

28/ *Id.* Art. 11.
29/ Price Waterhouse, *supra* note 20, at 31, 33; Nazer, *supra* note 18, at 137.
30/ Feb. 27, 1975, 26 U.S.T. 459, T.I.A.S. No. 8045.
31/ *Id.* Art. 1.
32/ *Id.* Art. 2.

Agreement also provides for resolution of interpretative problems and arbitration.[33]

U.S.-Saudi Arabia Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce and Navigation.[34]--This Agreement is to remain in effect until the entry into force of a definitive treaty of commerce and navigation. The Agreement provides that nationals of the United States, its territories, and possessions have, in Saudi Arabia, the right to be treated in accordance with the requirements and practices of generally recognized international law. U.S. persons, possessions, and rights are to receive most-favored-nation treatment in regard to their persons, property, rights, and interests in any manner.

33/ *Id.* Art. 3.

34/ Nov. 7, 1933; entered into force, Nov. 7, 1933, 48 Stat. 1826; E.A.S. No. 53; 11 Bevans 456; 142 U.N.T.S. 329.

Switzerland

Introduction to its Legal System

Basic governmental authority in Switzerland is derived from 3,100 communes, which are local areas consisting of a single village, a portion of a sizable village or city, or a rural region containing several small settlements. Each citizen belongs to a home commune and is admitted to national citizenship only through citizenship conferred upon him by the commune.

Switzerland is a confederation of 23 Cantons. A constitution grants the Federal Government limited powers, with the remaining powers reserved to the Cantons. Legislation authority not granted to the Federal Government is enacted by cantonal councils. As a result, laws on many subjects, such as taxes, may vary widely from Canton to Canton.[1/] (Each council acts as both the cantonal legislative and administrative body.)

The Swiss Code of 1907, although primarily based on existing local institutions and on original thinking of its eminent draftsman, Eugene Huber, was influenced substantially by the German and French codes.[2/]

Climate and Laws Governing Real Property

This section describes the climate and the laws governing real property investment in Switzerland:

The real estate profession and its operation.--This section discusses the regulation of real estate professionals and how the latter are compensated. Activities of real estate professionals are controlled primarily by local and cantonal laws and practices, which in practice vary. The work of two professional organizations, the Schweizerischer Verband der Immobilien-Treuhander and the Union Romande des Gerants et Courtiers en Immeubles, recently have brought some uniformity in these practices. These two organizations have a Committee for Joint National Policy, which aims at coordinating activities in the interest of uniform practice.

Approximately 2,000 persons engage in real estate practice, and 500 of them belong to at least one of the two professional organizations. Although no Federal licensing of real estate professionals exists, a few Cantons do impose a license, which is a type of business license tax. The two organizations mentioned above give courses both for present practitioners and those wanting to enter the profession. At the end of

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1/ Cosner, Real Estate--European Style 505 (1976).
2/ R. Schlesinger, Comparative Law 383-84 (1970).

the course, a 3-day examination is given under the supervision of the Joint Commission for Examinations in Real Estate, with a diploma given for successful examinees. Five Cantons require the diploma or cantonal examination of persons to qualify them to engage in some phases of the real estate business. It is expected that most Cantons soon will have a similar requirement.

All real estate forms must be listed in the Register of Commerce, which is maintained by the cantonal authorities. A real estate professional can be identified by key words, which vary according to the language used: Immobilien-Treuhander in German; Gerants et Courtiers en Immeuble, in French; and Agenti Fidiciari or Agenti Immobiliare in Italian.

Compensation for real estate services varies, especially between the metropolitan and the mountain or rural Cantons. Although the standard rates of commission are published by the two organizations and are generally followed by the membership, they are not compulsory.

Sales and leases of improved property earn a commission of 30 percent, payable as a rule by the seller; vacant land, farms, and business, 5 to 10 percent, depending on the total price; industrial property, 3 percent; management, 5 percent of gross rents; financing, 1 to 2 percent of the amount of the loan. In addition, some professionals serve on a consulting basis, by individual agreement, charging a fee according to the time required.

In the larger cities, agencies as well as established real estate offices specialize in locating homes or apartments for rent. The tenant pays the commission that can range between 20 and 50 percent of the first month's rent. The tenant, in renting furnished facilities, also will pay a tax levied by the Canton and the commune, usually in the amount of 10 percent or less of the total rent.[3/]

Financing institutions and practices.--Switzerland has a worldwide reputation for its efficient banking system. There are 500 banks with more than 1,600 branch offices. Four major banks dominate commercial and foreign banking. They are followed in importance by 287 cantonal banks, which secure capital by issuing bonds held primarily by cantonal government bodies and limit their business mainly to mortgages and financing local trade. More than 110 savings banks exist, and they primarily finance residential construction. There are also more than 300 lessor local and commercial banks and close to 100 branches of foreign-based banks.[4/]

Mortgage practices in Switzerland vary between the German-speaking area and the French- and Italian-speaking areas. In the German-speaking areas, by custom only the interest must be paid on a first mortgage.

3/ The discussion on the real estate profession and its operation is derived from Cosner, *supra* note 1, at 507-09.

4/ *Id.* at 502.

The principal neither is amortized nor becomes due. In the event a second mortgage is used in financing, it is usually amortized within a period of 5 to 10 years. An unamortized first mortgage provides for a variable interest rate, which changes as rates in the money market change.

In the French- and Italian-speaking areas of Switzerland, practice requires that first mortgages be amortized, usually within a 20-year period.

First mortgages in Switzerland normally are restricted to not more than 65 percent of appraised value. Second and third mortgages can be negotiated for the difference up to 85 percent. The first mortgages are made by the cantonal banks, local banks, savings banks, commercial banks, and insurance companies. Second and third mortgages are made through finance companies, subsidiaries of some of the banks, and individuals.5/

Lease practices and market conditions.--In Switzerland, leases usually are made not for a term of years, but for an unstated period. The lessee normally has a right of termination on 3- or 4- months' notice effective at the end of March, June, or September, but rarely at the year-end. In practice, the owner will not terminate except for cause, but the lease will provide for changes in rent to reflect changes in taxes and mortgage interest rates.

In recent years, condominium and cooperative apartments have accounted for about four-fifths of the living space built. Although the sale of office space is not as usual as is the renting of apartments, office buildings are constructed expressly for sale on a condominium basis.6/

The law of immovable property.--Swiss law distinguishes between immovable and other types of property. Included in immovable property are: (1) land; (2) the independent and lasting rights entered in the Land Register, such as specific building leases; and (3) mines. Restricted rights in rem on immovables include servitudes, usufruct, land charges, and mortgages. Swiss property law allows for ownership or coownership of a particular story or floor of a building.7/

The Land Register Office.--A Land Register exists in Switzerland for the public recording of all real property. A right in rem on real property must be recorded in the Land Register, and therefore it does not exist as a valid right in rem unless it appears in the Land Register. A person who in good faith relies on an entry in the Land Register

5/ Id. at 511.
6/ Cosner, supra note 1, at 512-13.
7/ 7 Martindale-Hubbell Law Directory 4106 (1979).

acquires ownership or other rights in rem, is protected in this acquisition.[8/]

Sale and transfer of real estate.--In acquiring property, only entering the right in rem in the Land Register brings the right into existence. In most cases, to be valid, agreements for the conveyance or encumbrance of real estate must be publicly authenticated. For certain agreements, a written form is needed.

The recognition of publicly authenticated acts concerning immovables done outside of the Canton where the immovable is situated is left to the laws of the Canton where the immovable is located. In certain Cantons (e.g., Zurich, Berne), only publicly authenticated acts are recognized which are made according to their respective legislation by an authenticating person authorized for the district where an immovable is located.[9/]

Construction restrictions.--The decree requiring licensing for construction of new buildings and demolition of old buildings has been suspended. Hence, construction can now occur without major barriers.[10/]

Zoning.--In 1972, a provisional federal decree introduced cantonal planning to protect the countryside. It prohibits construction on the borders of rivers and lakes, sites of special beauty or characteristics, etc.[11/]

Agriculture.--Special legislation protects land used exclusively or predominantly for agricultural purposes, and is aimed at protecting farmers and farming. It prohibits the sale of such land within 10 years of acquisition, except with a special permit by cantonal authority. The latter is granted only for limited reasons, such as to partition an estate or right of preemption of kin. The purpose of this legislation is to preserve the agricultural character of scarce land and to discourage speculation.[12/]

Family laws and rights in real property.--Three systems of regulating property rights between husband and wife exist in Switzerland: combination of property, community of property, and separation of property. Combination of property is the usual system and applies unless law or contract provides for the application of one of the other systems. Contracts governing property rights between spouses can be made before

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8/ Code Civil Suisse (C.C.) sec. 973, id. at 4107.
9/ 7 Martindale-Hubbell Law Directory 4106 (1979).
10/ Id. at 4107.
11/ Id.
12/ Id.

or after marriage and must be in the form of a publicly authenticated document.

Under the system of combination of property, the property of the spouses remains separate. The wife's fungible property goes into the husband's property and the husband takes care of ordinary administration. The wife has a privileged claim for this property when the marriage is terminated, each spouse or his or her heirs obtains his or her property, and the wife receives the amount of her privileged claim. If, after deduction of such property and claim, a surplus exists, it passes two-thirds to the husband or his heirs and one-third to the wife or her descendants. If less exists than the spouses had at the beginning, the loss is suffered by the husband or his heirs, unless it can be demonstrated that such loss has been caused by the wife. A marital contract also can provide for a different division of the property.

Community property is owned jointly by the spouses. The husband is responsible for ordinary administration. When the marriage terminates, each spouse or his or her heirs receive one-half of the community property. The spouses can agree pursuant to a marital contract to divide the community property in some other way. However, the descendants of the deceased spouse should receive at least one-fourth of the total property existing at the deceased's death.

In the system of separation of property, each spouse retains his property and the right to administration.[13]

Descent and Distribution

This section discusses descent and distribution in Switzerland in three sections: intestate and testate succession, wills, and foreign wills.

Intestate and testate succession.--In Switzerland, in the event the decedent dies intestate, the distributees designated by law, the so-called legal heirs, will inherit. In addition, the legal heirs receive any property not disposed of by the decedent.

Legal heirs inherit not by degrees of relationship to the decedent, but according to the system of the "parentel" order. This system classifies the decedent's relatives by main stems, each group of which a member is living, and thereby excluding the subsequent group. A main stem or parentel contains the head of the main stem with all his descendants, the latter being divided by lower stems (*per stirpes*).

A surviving spouse is protected under the law and can choose among four succession alternatives.

An estate inherited intestate to the extent that it is not inherited by the surviving spouse, devolves upon: (1) the children of the decedent in

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13/ *Id.* at 4100.

equal shares, (2) the parents of the decedent, each one-half, and (3) grandparents of the decedent, each one-fourth.[14]

Wills.--In Switzerland, a person may dispose of any part of his property by will to the extent that the law does not obligate him or her to give a share of the estate to certain legal heirs.[15]

Two types of wills are provided for in the Civil Code: publicly authenticated wills[16] and holographic wills.[17]

Foreign wills.--Unless treaties provide otherwise, a foreigner may set forth in his or her will that the order of distribution should be made according to the laws of his or her country. In this way, the testator also may eliminate the compulsory shares provided for in Swiss law. However, in a case brought by the Geneve Court de Justice Civile in 1958, the right of U.S. citizens to apply U. S. law was denied as contravening Article IV of the Treaty of Friendship, Commerce, and Navigation between the U.S. and Switzerland.[18]

Wills executed abroad are recognized in Switzerland as valid in form, if they comply with the law of either (a) the place of execution, (b) the decedent's domicile at the time of execution or at the time of his death, or (c) the country of which the decedent was a citizen.[19] Switzerland is also a party to the Hague Convention of October 5, 1961, concerning the applicable law on the form of wills.

Other Municipal Laws Relevant to Foreign Investment in Real Estate

Forms of business enterprise.--Several forms of business enterprise are available in Switzerland. Corporations often are used and as a rule are created by private law without official consent or official supervision. Corporate forms most often used by foreigners investing in Switzerland include: joint-stock companies, general- and limited-partnership shareholder corporations, and limited-partnership corporations. The partnership also is often used. The available forms of partnership are the ordinary partnership, the general or collective partnership, and the general and limited partnership.

It is not possible to create an Anglo-American trust in Switzerland. However, transfer of ownership or of a claim to a fiduciary is recognized by Swiss law.

14/ Id. at 4094.
15/ Code Civil Suisse (C.C.) sec. 481.
16/ Id. secs. 499-504.
17/ Id. secs. 500-508.
18/ 7 Martindale-Hubbell Law Directory 4113 (1979).
19/ Federal Law of 1891, Art. 24.

Commercial Register.--A person or entity engaging in commerce, trade, manufacturing, or any other business must register his firm in the Commercial Register of the district in which its seat is located. Unless they are entered in the Commercial Register, many legal entities cannot come into existence. Branch offices of firms which have their main office abroad also must register. Registration is accomplished through a publicly authenticated instrument.[20]

Laws Applicable Primarily to Foreign Investors

Swiss national policy, although not inviting foreign investment, has not, with the exception of real property, imposed restrictions on it. Some cantonal or communal requirements for approval of construction or of industrial location always have existed. The acquisition of property by nonnationals was not restricted in the postwar period until the early 1970's, when foreign-development projects in the Italian-speaking Ticuro area and in some of the ski resort areas caused inflation of land prices and alarmed Swiss nationals. Despite cantonal restrictions, the pace of contruction, especially of apartments, and prices have accelerated.[21]

Laws applicable to the acquisition of real estate by persons residing abroad.-- The Federal Decree of March 23, 1961, on the Acquisition of Real Estate by Persons Residing Abroad,[22] as amended, requires that, prior to acquiring real estate in Switzerland or certain rights thereto, persons residing abroad must obtain a permit from the competent cantonal authorities.[23] The Decree is expected to be altered in July 1979, with further limitations placed on the number of permits issued by cantonal authorities.

A person residing abroad also must obtain a permit to purchase shares of: (1) property belonging to juristic persons or to personal corporations without a juristic personality, if the whole or principal part of the property consists of real property, (2) real estate investment trusts (Immobilienanlagefonds), so long as they are not ordinarily handled on the market, and (3) shares of similar property.[24]

A person residing abroad is defined under the statute to include, *inter alia*: (1) natural or juristic persons who do not have their domicile or seat in Switzerland; (2) partnerships without juristic personality, but capable of owning property, which do not have their seat in Switzerland; and (3) juristic persons and partnerships without juristic personality,

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20/ 7 Martindale-Hubbell Law Directory 4088 (1979).

21/ Cosner, *supra* note 1, at 503.

22/ Amtliche Sammlung der Bundesgesetze und Verordnungen (AS) [official law gazette of Switzerland, 1964] 203, implemented by the Decrees of the Federal Council of Dec. 21, 1973 (at 94) and of Feb. 11, 1976 (at 607).

23/ *Id.* Sec. 1.

24/ *Id.* Sec. 2.

but capable of owning property, which have their seat in Switzerland, but whose financial control is by persons without a domicile or seat in Switzerland.

The Decree provides that domicile in Switzerland does not include a sojourn without a permit to stay or which did not continue uninterrupted for more than 5 years.[25/] The Decree refers to certain provisions of the Civil Code for the remaining definition of "domicile" and "seat". The Civil Code provides that the domicile of a natural person is the place in which he sojourns with the intention of a continuing stay and that no person can have a domicile in several places at once.[26/] Once acquired, the domicile of a person remains such until the acquisition of a new one.[27/] The domicile of the husband is the domicile of the wife. The domicile of the mother and the father is that of their children. The seat of the Guardians Court is that of the wards. If the husband's domicile is not known, or the wife is legally separated, she may take an independent domicile.[28/] A juristic person has as its domicile the place where its business (Verwaltung) is carried on, unless it is otherwise provided by its articles.

Under certain circumstances, a permit is not necessary.[29/] A permit is refused unless the applicant can demonstrate a legitimate interest. A legitimate interest includes the use of real estate primarily for a trading, manufacturing, or other commercial establishment. Under certain circumstances, acquisition of real estate for personal use may be a legitimate interest. Acquisitions for investment purposes are deemed a legitimate interest only for new low-rent housing.[30/] Despite the existence of a legitimate interest, a permit may be denied when the real property is located outside a building area recognized by Federal housing as an area in which purchases of such property by nonresidents have reached a considerable volume, or is close to an important military installation where the purchaser may endanger military security.[31/] Transactions in which real estate was acquired without obtaining a permit have no legal effect. Consideration given in such invalid transactions may be reclaimed within certain time limits. A person who participates in a transaction for which no permit was obtained is liable to imprisonment or fines.[32/]

In addition to the above-mentioned provisions of the Decree, the Federal Council has promulgated several decrees regulating the acquisition of real property in areas, the economy of which depends on the tourist

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25/ Id. Sec. 4(2).
26/ Id. Sec. 23
27/ Id. Sec. 27(1).
28/ Id. Sec. 25.
29/ Id. Sec. 5.
30/ 7 Martindale-Hubbell Law Directory 4107 (1979).
31/ Id. at 4107; Library of Congress, Survey of Restrictions that Nations Place on Landownership by Nonresidents in Staff of Sen. Comm. on Agriculture, Nutrition, and Forestry, 95th Cong. 2d Sess., Foreign Investment in Agriculture Land 211 (Comm. Print, 1979).
32/ 7 Martindale-Hubbell Law Directory 4107 (1979).

industry. The cantonal authorities may permit foreigners to acquire condominiums in towns and villages relying on tourism, if the communities depend on condominium sales to promote tourism and provided that the ownership share of foreigners has not reached substantial proportions.33/

In practice, permission usually is given to retired persons. The Lugaw area remains popular for real estate investments by Italian nationals and the Locarno-Ascona area is popular with the Germans. In the Italian-speaking canton of Ticino, an area that is mediterranean in climate, foreigners are attracted for both holiday and retirement.34/

Foreigners' acquisition of Swiss farmland.--As a practical matter, it is exceedingly difficult, almost impossible, for foreigners to acquire farmland in Switzerland. For many generations, the tendency has been for farms to become smaller, divided, and redivided among the children from generation to generation. However, now younger people are beginning to migrate to the cities, and farms are being sold to neighbors to create larger and more economic units. When farms do become available, a neighboring farmer wants it and is favored over foreigners.35/

In addition, land used exclusively or primarily for agricultural purses is governed by special laws which are aimed at protecting farmers and farming. These laws prohibit sales within 10 years of acquisition, except with special permit by cantonal authority for the purpose of partitioning of an estate, right of preemption by a next of kin, etc.36/

Currency restrictions.--No special foreign-exchange restrictions exist between the United States and Switzerland. However, from time to time, specific restrictions, licensing, and charges are imposed on the flow of new foreign capital and funds into Switzerland, or in Swiss currency. Investment in Swiss bank accounts incurs so-called negative interest charges. Since February 27, 1978, new investments in Swiss securities (stocks, bonds, notes, etc.) by nonresidents have been precluded. Nonresidents also are forbidden to invest in securities issued by nonresidents, but denominated in Swiss francs.37/

Internal and external financing.--Resident and natural persons and resident businesses or industrial enterprises must have a license from

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33/ Verordnung ubor den erwerb von Grundstucken, in Auskind (Regulations Concerning The Purchase of Real Estate in Resort Town by Nonresidents) (AS), Art. 1 (1976); Doing Business in Europe (CCH) New Developments sec. 30,911.

34/ Cosner, *supra* note 1, at 510.

35/ *Id.* at 510.

36/ Code Penal Suisse (C.O.) 218, in 7 *Martindale-Hubbell Law Directory* 4107 (1979).

37/ *Id.* at 4095.

the Swiss National Bank if they want to obtain credit abroad for amounts over S.Fr. 50,000 or for amounts in foreign currencies of the equivalent of more than S.Fr. 1 million. A license also must be obtained to renew old foreign credits which have been due.[38/]

Taxation

Introduction.--In Switzerland, most of the direct taxes are levied by Cantons and municipalities. On the Federal or national level, the most significant tax is the "defense tax," which includes: (1) personal net income tax, (2) corporate net income tax, and (3) corporate capital tax. In addition, among national taxes are a turnover tax, and minor and special taxes.

Cantons and communes also may levy taxes, including: (1) personal net income tax, (2) corporate net income tax, (3) personal capital (fortune) tax, (4) corporate capital tax, (5) church tax, (6) real property tax (in 13 Cantons), (7) real property transfer tax, (8) real property capital gains tax, and (9) inheritance and gift taxes.

The federal and the cantonal income and capital taxes are levied and assessed by the Cantons. The revenues are shared between them and the towns and villages on an agreed-upon basis.[39/]

Taxes on individuals.--An individual is subject to Federal personal income tax, levied on a progressive scale. Married persons are taxed as a unit. Yearly rates are 0.22 to 11.5 percent, up to an income of S. Fr. 392,000.[40/]

Cantons and communes have diverse policies in levying income taxes. In most cases, a capital gains tax is imposed on an individual's assets to supplement the income tax, and is based on a sliding scale that increases with the amount of the individual's assets. In determining a person's income, the imputed or "rent value" of an owner-occupied house is included.[41/]

Ordinarily, aggregate direct taxes of Cantons and municipalities impose a heavier burden on individuals than is done by the Federal defense tax, and are as high as 34 percent (the Canton and City of Zurich). In addition, a social security tax of 5 percent must be paid.[42/]

In certain Cantons, specific statutory privileges are offered to aliens who reside in the Canton without being engaged in business.

38/ Id. at 4098.
39/ Cosner, supra note 1, at 515-16.
40/ 7 Martindale-Hubbell Law Directory 4108 (1979).
41/ Cosner, supra note 1, at 516.
42/ 7 Martindale-Hubbell Law Directory 4109 (1979).

Taxes on corporations.--Corporate taxes are imposed on both a Federal and cantonal level. On the Federal level, a corporate tax is levied on net income, with the rates imposed on a progressive basis related to paid-in capital and net profit. The rates of taxation vary from 3.3 to 9.8 percent of net profit and 0.825 per mille of paid-up capital and reserves.43/ A Federal corporate capital tax supplements the income tax.

Cantonal tax rates on corporate net income vary widely. The top average cantonal plus Federal tax burden on corporations ranges from 24 to 38 percent of profit, e.g., Zurich, 38 percent; Geneva, 32 percent; Zug, 24 percent. However, these rates alone may be deceptive, since certain cantons allow deduction of taxes as business expenses while others do not.44/ Depreciation rates on a double-declining basis may be utilized. Some typical rates are: 1 percent on worker housing owned by the employer or by property companies; 2 percent on commercial property; 3 percent on hotel and restaurant premises; 25 to 30 percent on manufacturing machinery of diverse types; and 50 percent on water pollution abatement machinery.45/

Real estate taxes.--In addition to the capital tax, in which is included the net value of real estate, an additional tax is imposed on real property by some Cantons and communes. The tax is imposed on gross value as assessed for purposes of the capital tax, but without allowance for mortgage debt. The rate varies from 0.075 to 0.275 percent. In some cases, the rate is progressive and increases according to the amount of property owned. In other cases, it is imposed at a fixed rate or on land only.46/

Other property taxes.--Two types of taxes become due when a landowner sells his or her property. A "real estate gain" tax is applied to the difference between the purchase price and the selling price. Although it is imposed pursuant to cantonal law, it is imposed by the commune. Ordinarily, the amount of profit subject to the tax varies with the holding period: the longer the property is held, the less is the tax.

A tax at the time of sale also is imposed on the total price of property. It may be imposed by the Canton or by communes, or both. The rate of tax varies from 0.5 to 3.0 percent. Currently, the Cantons are trying to cooperate to establish a uniform practice in imposing this tax.47/

The legislator or person interested in U.S. public policy and how to control inflationary prices of agricultural land, especially where the alien investor may be involved, should be aware of Swiss tax policy. It

43/ Id.
44/ Id.
45/ Cosner, supra note 1, at 517.
46/ Id.
47/ Id. at 518.

discourages speculative gains and has been effective especially with respect to agricultural land.

During the initial 5 years after the purchase of property, the assessed value is the price paid. Thereafter, it is reassessed at the "rent value," which is the amount that the taxpayer must record as the base for the capital tax and also as the imputed rent for income tax purposes if the property is owner-occupied. As an unwritten, but generally understood rule, farm rent values tend to be assessed low. Upon the sale by a farmer of his property, the tax authorities may review the assessed value for the previous 20 years and collect the applicable amount of capital tax for the period on the difference between the assessed value and the sales price. This policy in effect discourages the sale of farms. The variety and severity of taxes on the sale of land, especially farmland, encourages the retention of ownership.

Inheritance and gift taxes.--Most Cantons impose inheritance and gift taxes. A tax is imposed by the Canton in which the decedent or donor is domiciled, although the tax is assessed against heirs, beneficiaries, or donees, who are jointly liable for its payment. Rates also vary according to the degree of relationship to the decedent or donor: the closer the kinship, the lower are the tax rates.[48]

International Agreements

Convention of Friendship, Commerce, and Navigation.[49]--This Convention between the United States and Switzerland is one of the earliest FCN treaties of the United States. The provisions concerning the right of U.S. persons to invest and engage in business enterprises in Switzerland are not as comprehensive as in more recent U.S. FCN treaties.

The Convention gives U.S. persons the right to acquire, possess, and alienate property, as further explained in a subsequent Article of the Convention. The latter Article sets forth all the rights which other FCN treaties take several articles, each with many paragraphs, to explain.[50]

U.S. citizens have the right to dispose of their personal property in Switzerland by sale, testament, donation, or in any other manner. Their heirs, by testate or intestate succession, are to succeed to the property and have possession of it. They may dispose of such property and are to be subject to no other charges than those to which the inhabitants of Switzerland are liable to pay in a similar case.

48/ 7 Martindale-Hubbell Law Directory 4110 (1979).
49/ Nov. 25, 1850, 11 Stat. 587, T.S. No. 353, 11 Bevans 894.
50/ Id. Art. 7.

The provisions set forth in the above paragraph apply to real estate located within those Swiss Cantons in which foreigners are entitled to hold or inherit real estate. However, the Convention does not preclude the imposition of restrictions by a particular Swiss Canton. The Convention provides further that if real estate is situated in a Swiss Canton and is transferred to a U.S. citizen who, due to his being an alien, cannot hold such property in the Swiss Canton in which it is situated, such an heir or successor is entitled to have such a period of time as the Canton will permit to sell the property. The heir is free to withdraw and export the proceeds thereof without difficulty and without paying to the Government any charges other than those which in a similar case would be paid by an inhabitant of Switzerland.51/

In summary, the Convention is at best vague in setting forth the various rights of U.S. persons investing in Swiss property.

Convention for the avoidance of double taxation with respect to taxes on income.52/--This Convention provides that a U.S. person's income from real property, including gains derived from the sale or exchange of such property (but not including interest from mortgages or bonds secured by real property) and royalties from the operation of mines, quarries, or other natural resources--is taxable only in Switzerland when such property, mines, quarries, or natural resources are situated in Switzerland.53/

The Convention allows a U.S. resident or corporation or other entity deriving income from such property within Switzerland to elect to be subject to tax in Switzerland on a net basis, as if such resident or corporation or entity were engaged in trade or business in Switzerland.54/

The Convention provides that a U.S. enterprise is not subject to Swiss taxation of its industrial and commercial profits, except on profits allocable to a permanent establishment located in Switzerland.55/

Under the Convention, Switzerland cannot impose more than a 15-percent withholding tax on dividends derived by a U.S. resident or corporation or other U.S. entity not having a permanent establishment in Switzerland. The rate of withholding tax cannot exceed 5 percent in other specified circumstances.56/

The rate of withholding tax imposed by Switzerland on interest on bonds, securities, notes, debentures, or any other form of indebtedness (including mortgages or bonds secured by real property from sources in Switzerland by a U.S. resident, corporation, or other entity) cannot exceed 5

51/ Id. Art. V.
52/ May 24, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2316, 127 U.N.T.S. 227.
53/ Id. Art. IX(1).
54/ Id. Art. IX(2).
55/ Id. Art. III(1)(b).
56/ Id. Art. V.

percent.57/ Similarly, royalties derived by a U.S. person, corporation, or entity from Swiss sources cannot be subject to more than a 5 percent withholding tax.58/

Convention for the avoidance of double taxation with respect to taxes on estates and inheritances.59/--This Convention assists U.S. persons investing in Switzerland to avoid being subject to double taxation on estates and inheritances. It covers real property upon agreement by the competent authorities of the United States and Switzerland.60/

57/ Id. Art. VII.

58/ Id. Art. VIII.

59/ July 9, 1951, 2 U.S.T. 1751, T.I.A.S. No. 2533, 165 U.N.T.S. 51.

60/ Id. Arts. III, IV.

United Kingdom

Introduction to the Legal System

The United Kingdom has as its form of government a constitutional monarchy. Its Constitution, although unwritten, is a mixture of parliamentary statute, common law, and "the traditional rights of Englishmen," as set forth in several important historical documents.

Although the executive is nominally the Sovereign (King or Queen), executive authority in practice is delegated to the Prime Minister, who is appointed by the Sovereign, and traditionally is the leader of the majority political party in the House of Commons. The Prime Minister selects Ministers and Parliamentary Secretaries to head important departments. They are then officially appointed by the Sovereign to form the Cabinet.

Real property law traces its origins back to the 11th century and the feudal estates, when knights and nobles gained land tenure in exchange for military and other service to the Crown. Under a manorial system those who tilled the land gained security of rights by serving the lord of the manor. The need to preserve a record of these rights led to the initial survey and documentation in the Domesday Book in 1086, which was the first complete and official written registration of rights in land. Changing and developing real property rights have had and continue to exert an important role in the evolution of the common law: the use of money rent in lieu of personal services; the right to and concept of title in "fee simple"; an interest in real property that was alienable and heritable; and the development of rules of equity to supplement and provide flexibility to the common law of property.[1/]

Climate and Laws Governing Real Property

The real estate profession and its operation.--Real estate professionals have been organized since 1868, when the still-existing Royal Institution of Chartered Surveyors (RICS) was formed. The term "surveyor," the English equivalent to a real estate broker in the United States, means an individual engaged in various phases of property valuation and administrative work. "Chartered Surveyor" signifies a member of the RICS. The Royal Institution has a membership of 30,000 individuals.

The work of a Chartered Surveyor is diverse. Some Chartered Surveyors have a general practice, which embraces the following activities: residential sales and rentals; commercial and/or industrial sales and leasing; rural land sales; and auction sales of both real and personal property. Some Chartered Surveyors serve as Quantity Surveyors, who supervise the construction of buildings as experts on contracts, costs, cost control, and documentation. Chartered Surveyors also may act as

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1/ E. Cosner, Real Estate--European Style 565-71 (1976).

land surveyors, whose work is to survey and map areas. Another significant activity of Chartered Surveyors is real estate management, such as management of office blocks, shopping centers, shops, apartments, and agricultural estates. It also may include: development of housing, commercial, and industrial projects; development of recreational projects; and town and country and environmental planning.

Certain requirements must be met for membership in the Royal Institution. After applicants have attained a specified educational background, they may begin as "Students" at the age of 17 or more. "Students" who pass the first two of three examinations within at least 5 years may become candidates for membership. If applicants are older, they may apply as "Probationers" under similar requirements. When applicants reach the age of 21 or more, they must pass the third (and final) examination to be eligible for continuing. Candidates become eligible for election to "Professional Associate" if they actually are engaged in approved professional work and have fulfilled at least 4 or 5 years of sufficient training experience. At the age of 30, an applicant who has passed all the required examinations and has had at least 5 years' experience as a surveyor or 12 years as a Professional Associate is eligible for election to full membership as a "Fellow" and becomes a "Chartered Surveyor" upon agreeing to the rules of professional conduct.

Professional fees charged for the variety of services available, although not mandatory, are well-established by practice. Most of them involve a schedule based upon the value, rent, or sales price of property, and are published with copies publicly available. If the employment services entail travel, advertising, inventorying of personal property, or any unusual assignment on the part of the agent, fees in addition to the fee scale may be charged and usually are specified in the written memorandum of employment.

Financing institutions and practices.--The Bank of England fixes the "bank rate" at which financial institutions may borrow from it. Since commercial banks make loans not at a fixed rate for a definite term, but at a variable rate tied to the bank rate, the latter often determines the availability of loans.

Savings institutions also are important sources of financing. The National Savings (Post Office) Bank, private Trustee Savings Banks, pension funds, investment trusts, and unit trusts all provide financing services. There are about 5,000 building societies which constitute the main source of loans for owner-occupied homes. Other forms of financial institutions, primarily subsidiary to the banking system, undertake medium- and short-term loans to industry, and participate in equity financing, leasing, and the granting of installment credit.[2/]

Funds for commercial mortgages ordinarily are relatively expensive. Construction loans are made from some of the foreign and commonwealth

2/ *Id.* at 568-69.

banks. In recent years, these banks have used the Eurodollar market as a source of funds, although at interest rates of 15 to 20 percent or more for short-term (1 to 3 years) loans. Construction loans also are available from some of the commercial bank subsidiary organizations, such as the Industrial and Commercial Finance Corporation and the Charterhouse Industrial Development Corporation.

Long-term funds for major construction projects come primarily from the more than 200 insurance companies in the United Kingdom. The secondary source is pension funds, of which more than 60 percent are privately administered, with the remainder being the funds of Government and nationalized industry employees.

Most of the mortgage funds for owner-occupied homes come from building societies. The main supplemental sources are the trustee savings banks, insurance companies, and pension funds. The Government-owned National Savings (Post Office) Bank makes home loans to Government employees, particularly under the Government option mortgage program, under which the interest rate is about 2 percentage points below the market.[3/]

Rent controls.--All residential rental units in lower rental values are "regulated tenancies," or subject to rent control. These rent controls are changed from time to time.

Business rentals are controlled under the Landlord and Tenant Acts, which under certain circumstances give security of tenure to the lessee in exchange for which he or she must pay market rents.[4/]

The law of immovable property.--The Law of Real Property Act, 1925, has codified important common law of property. It provides that the only estates in land which can subsist, be conveyed, or created by law are: (1) an estate in fee simple absolute in possession; (2) a rent charge in possession on land, either perpetually or for a term of years absolute; (3) a legal mortgage; (4) land tax, rent charge, and any other similar charge on land not created by an instrument; and (5) rights of entry over or in respect of a legal term of years absolute or connected to a legal rent-charge.[5/] Much of real property law in the United Kingdom is uncodified, common law.

The land register office.--On a voluntary basis, Government registration of title to land began with the Land Registry Act of 1862, which supplemented the records originally put in the Domesday Book. Since 1925, the Land Registration Act has provided for mandatory registration of titles and their guaranty by the state. In certain counties, title registration has been made compulsory by order in council of the county council.

3/ Id. at 582-83.
4/ Id.
5/ 7 Martindale-Hubbell Law Directory 3522 (1979).

However, not all titles are yet registered in the United Kingdom, nor do they need to be registered.

Ten district land registry offices supervise the survey and registration of land in the areas in which registration is not yet compulsory.

When title is transferred, a notary is employed to search the registry. With respect to registered land, the title need not be reviewed for a period of more than 30 years, unless something appears within that period to raise doubts as to the validity of title.6/

The sale and transfer of real estate.--To be valid, a deed must be signed, sealed, and delivered. Although witnesses are not essential, a deed ordinarily is attested.

A corporation must execute a deed in the manner required by its articles of association. However, a deed executed by a corporation aggregate in favor of a purchaser is properly executed if its seal is affixed in the presence of its clerk, secretary, or other permanent officer or his deputy and a member of the governing body of the corporation.

A person who is authorized by power of attorney or any other power to convey an interest in property on behalf of a corporation may execute the conveyance by signing the name of the corporation in the presence of a witness and, in the case of a deed, by putting on it his own seal.7/

Land-use controls.--Before a purchaser buys land for development or a different use, he or she needs to carefully ascertain the effect of restrictions on historical sites and of the Town and Country Planning Acts. In general, stringent controls are now held and exercised by local planning authorities. New construction or even a change of the exterior of an existing building, unless nominal, must be approved by the local authority acting under the direction of the ministries within the Department of the Environment. A change in land use must have the approval of both the local authority and the Department of the Environment.8/

Land-use policy has been employed on a nationwide and regional as well as a local basis. The postwar period brought the planning and building of new towns and dormitory towns. In addition, in 1964, to divert construction capital and labor into other areas, the Government required an office development permit for all new construction.9/

6/ Cosner, *supra* note 1, at 584; 7 *Martindale-Hubbell Law Directory* 3522 (1979).

7/ 7 *Martindale-Hubbell Law Directory* 3513-14 (1979).

8/ Cosner, *supra* note 1, at 584.

9/ *Id.* at 588.

Family law and rights in real property.--Under the Law Reform (Married Women and Tortfeasors) Act, 1935, married women are accorded rights equal to those of a single woman for all purposes connected with, *inter alia*, the holding of property. The Act provides that restraints on anticipation or alienation of a married woman's property which could not have been attached to property held by a man are removed, and for all practical purposes property can be transferred to women on the same terms as transfers can be made to a man.

Under the Married Woman's Property Act, 1964, money and property derived from a housekeeping allowance are, in the absence of an agreement to the contrary, treated as belonging to husband and wife in equal shares.

The Matrimonial Homes Act, 1967, strengthens the rights of husband and wife to occupy a dwelling house which has been a matrimonial home. It gives a spouse not entitled by virtue of any estate, interest, contract, or enactment protection against eviction and the right to occupy the home. It also provides for such statutory right of occupation to be registered as a charge against the house.[10]

Descent and Distribution

Intestate succession.--Intestate succession is governed by the Intestate Estates Act, 1952, as amended. It provides that the surviving spouse takes the whole of the estate absolutely if the decedent leaves no issue and no parent or brother or sister of the whole blood or issue of such brother or sister. If a decedent does leave issue, the surviving spouse takes all personal chattels and a life interest in half of the residue, with the issue taking the balance and other half residue after the death of the surviving spouse. If no issue survive but a parent or brother or sister of the whole blood or issue of such brother or sister, the surviving spouse takes all personal chattels and half the residue absolutely. If a parent or parents survive, half of the residue goes to such parent or parents absolutely. However, if no parent survives, the half-residue goes to the brothers and sisters of the whole blood.

In the event the matrimonial home constitutes part of the deceased's residuary estate, the surviving spouse generally can require the interest in the house to be appropriated towards any absolute interest of his or hers.

If there is no surviving spouse, the surviving issue take the whole estate in equal shares. If there is no issue but parents, they take in equal shares or, if only one, he or she takes all. If there is neither issue or parent(s), relatives take as follows: (1) brothers and sisters of the whole blood and their issue; (2) brothers and sisters of the half blood and their issue; (3) grandparent(s) in equal shares; (4) uncles

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10/ 7 *Martindale-Hubbell Law Directory* 3517 (1979).

and aunts being brothers and sisters of the whole blood of a parent and their issue; (5) uncles and aunts being brothers and sisters of the half blood of a parent and their issue; and (6) the Crown.11/

Wills.--A will can be made by any adult of sound mind. A will, to be valid, must be in writing and signed at the end by the testator or by some other person in his presence and by his direction. Such signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time. Such witnesses must attest and subscribe to the will in the presence of the testator and in the presence of each other.

Foreign wills.--For recognition to be accorded by a probate court to a foreigner's will, it must be in accordance with the law of the foreign country in which the testator was domiciled at his death, or the place of the testator's birth or death. The Wills Act, 1963, provides that a will is considered validly executed as regards form if it fulfills requirements of internal law of any of the following: place where it was made; place of the testator's domicile; country of testator's nationality; place where he or she had his or her habitual residence, or, so far as it disposes of immovable property, the place where property is located. In practice, an exemplified copy of the probate granted by the proper court of the foreign country in which the testator was domiciled at his or her death will be sufficient to produce auxiliary letters of probate in England upon the application of the executor.

A will which disposes of lands located in England must satisfy English form. Hence, a U.S. person owning real estate in England may find it beneficial to make an English will to cover the disposition of this piece of real estate.12/

Other Municipal Laws Relevant to Foreign Investment

Forms of business enterprise.--Branch companies, partnerships, and trusts are the chief means to invest in England.

Companies are classified into public and private limited companies. Two or more persons may form a private company, which is defined by the Companies Act, 1948, as one which by its articles of association limits the right of the shareholders to transfer its shares, limits the number of its members (exclusive of employees and ex-employees still members of a company) to 50, and prohibits any invitation to the public to subscribe for its shares or debentures.

11/ Id. at 3514-15.
12/ Id. at 3527.

Seven or more persons are needed to form a public company. It usually invites the public to subscribe by issue of a prospectus and is not restricted as to the number of members.13/

Partnerships, ordinary and limited, often are used to invest in real estate. Trusts are also widely used in England to hold real estate.14/

Commercial register.--Firms, individuals, and companies are required to register at the Business Names Registry only if they carry on a trade in a name other than their true name. There does not exist in England, as there does in most civil law systems, the requirement that all merchants must register. If a person using a trade name other than their true name fails to register, they cannot enforce their rights and may incur monetary penalties for failing to register.15/

Laws Applicable Primarily to Foreign Investors

Aliens, for all practical purposes, may take, acquire, hold, and dispose of real property in the same manner, in all respects, as a British subject. Procedural requirements apply to the use of currency in England (discussed below) and to establishing a place of business by a foreign corporation. In connection with the latter, every company incorporated outside the United Kingdom and establishing a place within it must under severe penalty file: (1) a certified copy of its charter, statute, or other instrument constituting or defining its constitution; (2) a list of its directors; and (3) the name and address of some person resident in the United Kingdom who is authorized to accept service of process or any notices required to be served on the company. In addition, every foreign company also must file such a statement of its affairs as is required to be filed by public companies incorporated in the United Kingdom.16/

Currency restrictions.--Foreigners are allowed to bring into the country an unlimited amount in notes and to take out any notes, other than those in U.K. or Irish currency, which they brought in with them.

Current exchange control regulations allow capital to be moved freely in and out of the United Kingdom. In special circumstances capital must be withdrawn through the Block Sterling market bearing a 1-percent levy.17/

Internal and external financing.--External loans made by U.K. persons for real estate investments may encounter substantial barriers. The

13/ Id. at 3512-13.
14/ Id. at 3512.
15/ Id. at 3510.
16/ Id. at 3512.
17/ Id. at 3515-16.

Treasury Department, pursuant to the Exchange Control Act, 1947, and regulations promulgated thereunder, provide for stringent Treasury control over any transfers by U.K. residents of currencies of countries not forming a part of the sterling area. Prior Treasury approval is required for all direct transfers of assets and settlements (other than by will), which involve payments in favor of nonresidents.[18/]

Currently, the policy of the Treasury is to allow foreign companies, once they are established in the United Kingdom, to raise all the sterling finance required for their operations.

Taxation

Personal income tax.--Income tax is levied on annual income or profits accruing to any person residing in the United Kingdom from any property, trade, profession, or vocation whether in the United Kingdom or elsewhere, and on income or profits of persons residing outside the United Kingdom from any property, trade, profession or vocation within the United Kingdom.[19/] Personal income tax rates start at 35 percent of taxable income up to L5,000 and progressively rise to 83 percent on taxable income over L20,000. The imputed rent value of an ownership is not included as income for tax purposes. A surcharge of 15 percent applies on unearned income (such as rent, dividends, interest, and so forth) after the first L2,000.

Corporation tax.--All companies resident in the United Kingdom are subject to corporation tax on all income and on all capital gains at a tax rate of 52 percent. There is a reduced rate of 42 percent for "small companies."

Taxation of corporation distributions.--U.K. companies must deduct income tax at the standard rate from all dividends paid by them, and they must pay such tax to the Inland Revenue. The United Kingdom introduced in 1972 an imputation system, whereby part of the corporation tax payable by a company on its profits is attributed or imputed to the shareholders when profits are distributed. The part is arrived at by applying the basic rate of income tax, currently 34 percent, to an amount equal to the distribution grossed up at that rate. For example, if a company makes a distribution of 66 units of income, the shareholder is considered as having received taxable income equal to 66 grossed up at 34 percent, namely 100, and as having paid tax on this income amounting to 34. If the taxpayer's marginal rate of tax is 34 percent, he or she will have no additional tax to pay. If it is higher than 34 percent, he or she will have an additional tax liability, and if it is nothing, he or she will be entitled to a repayment. A U.K. company is exempt from corporation tax on dividends received from other U.K.

18/ Id.
19/ Income and Corporation Taxes Act, 1970 (33 Statutes (17)).

companies. Hence, in the case of intercorporate dividends, the shareholder has no corporation tax to pay.

In the absence of a double-taxation agreement providing for such credit, nonresident shareholders, such as U.S. persons, are not entitled to the partial imputation credit. An exception is made for British citizens resident abroad.[20/]

Capital gains tax.--Since 1965, a national capital gains tax has applied to all gains, whether short- or long-term, at the rate of 30 percent. However, gains accruing to certain unit trusts and investment trusts are subject to a reduced rate of 15 percent. A further reduction of tax liability applies to a disposal of shares in such trusts by individuals and corporations. The tax is imposed on all disposals of capital assets, which includes gifts and transfers at death. Capital losses may be offset against capital gains of the same or a future year.[21/]

Nonresident companies are outside the scope of the capital gains tax although some provisions make U.K. shareholders of certain controlled nonresident companies subject to tax on capital gains realized by those companies.[22/]

Capital transfer tax.--All transfers of property *inter vivos* and at death are subject to the capital transfer tax, with certain exceptions. The tax is levied primarily on the donor. Tax is imposed on *inter vivos* gifts as they occur and on a cumulative basis, taking into account previous gifts made by the donor. The tax is levied on property transferred at death, taking into account *inter vivos* gifts by the deceased. The rates of tax become progressively higher on the cumulative total of taxable transfers.[23/]

Stamp taxes.--A stamp tax at the rate of 0.5 to 1 percent applies to all agreements for the sale of a business or any interest therein, and on the disposition of land or any interest therein.[24/]

Local property taxes.--The General Rate Act provides for taxation of real property by local governments. Local authorities levy "rates" to obtain revenue for their local and special-purpose services. The "rateable value" of property is determined by the rent that it produces or the appraised rental value of owner-occupied property not rented.[25/]

20/ L. Halpern, *Corporate Investment into the U.K.--Taxation Implications*, 19-22 (Marchmont Conference on International Tax Planning, Barbados, May, 1978).

21/ 7 *Martindale-Hubbell Law Directory* 3525 (1979).

22/ L. Halpern, *supra* note 20, at 12.

23/ 7 *Martindale-Hubbell Law Directory* 3525 (1979); Cosner, *supra* note 1, at 592.

24/ 7 *Martindale-Hubbell Law Directory* 3526 (1979).

25/ Cosner, *supra* note 1, at 591.

U.S.-U.K. Convention on Tenure and Disposition of Real and Personal Property.[26/]--This Convention provides many of the rights contained in the FCN treaties of the United States, except that it concerns only real and personal property rights. Despite its focus on only property rights, this Convention does not give as much protection of property rights as do most of the FCN treaties. Not covered are leasing of land, acquisition of land, and expropriation of property and right to compensation--as well as judicial remedies and internal taxation.

Whereas most FCN treaties set forth rights governing the owning and holding of land, this Convention does so only implicitly. The preamble to the Convention states that one of its purposes is to improve the condition of the citizens and subjects of each of the respective countries in relation to the tenure and disposition of real and personal property.

The treaty provides that a U.S. citizen or subject who inherits real property in the United Kingdom is allowed 3 years to sell the same. This term is to be reasonably extended if circumstances render it necessary. The U.S. citizen or subject may withdraw the proceeds thereof, without restraint or interference, and is exempt from any succession, probate, and administrative duties or charges other than those which may be imposed in like cases upon U.K. citizens or subjects.[27/]

The treaty also obligates the United Kingdom, following the death there of a U.S. citizen who has no known heirs or testamentary executors in that country, to immediately inform the nearest consular officer of the United States so that the necessary information may be forwarded to the persons interested. The U.S. consular official has the right to appear personally or by delegate in all proceedings on behalf of the absent heirs or creditors until they are otherwise represented.[28/]

U.S. citizens or subjects have the right to most-favored-nation treatment in disposing of every kind of property, real and personal, in the United Kingdom.[29/]

Under the treaty, U.S. citizens or subjects have a right to dispose of their personal property in the United Kingdom by testament, donation, or otherwise. In addition, their heirs, legatees, and donees who are U.S. citizens or subjects may succeed to such personal property, and may take possession of the same either by themselves or by others acting for them. They also may dispose of such property at their pleasure, and pay such duties only as U.K. citizens or subjects would pay in like cases.[30/]

26/ Convention as to Tenure and Disposition of Real and Personal Property, U.S.-U.K., March 2, 1899, 31 Stat. 1939, T.S. No. 146.
27/ Id. Art. I.
28/ Id. Art. III.
29/ Id. Art. IV.
30/ Id. Art. II.

U.S.-U.K. income tax treaty.--The treaty provides that a U.S. resident, who is subject to U.S. tax, deriving royalties from natural resources and rentals of real property from sources within the United Kingdom, and who is not engaged in a trade or business in the U.K., is exempt from the U.K. surtax.31/

The treaty provides that gains realized by U.S. persons from the disposition of capital assets in the United Kingdom are exempt from U.K. tax, except where the gain is derived from an asset that is effectively connected with a permanent establishment.32/

According to the treaty, interest derived by a beneficial owner resident in the United States is exempt from tax in the United Kingdom, unless the interest is effectively connected to a permanent establishment in the United Kingdom.33/ Similarly, royalties derived by a beneficial owner resident in the United States from a U.K. source are exempt from tax, unless the royalties are effectively connected with a permanent establishment in the United Kingdom.34/

A U.S. enterprise can be taxed in the United Kingdom on its industrial or commercial profits only if it has a permanent establishment in the United Kingdom.35/

With respect to the treatment of dividends in the treaty, the United Kingdom may tax dividends from U.K. sources at its statutory rate (e.g., 52 percent), if the dividends are effectively connected with a permanent establishment maintained by a U.S. resident or corporation in the United Kingdom and, in the case of a U.S. corporation, the profit from the sale of the holding with respect to which the dividend is received would be treated as a trading receipt. If dividends paid from U.K. sources are not so characterized, the United Kingdom is limited to taxing the dividends at a maximum rate of 15 percent.36/

31/ *Id.* Art. IX.
32/ *Id.* Art. XIV.
33/ *Id.* Art. VII.
34/ *Id.*
35/ *Id.* Art. VI
36/ *Id.*

Summary

Two subject-matter areas are of special interest with respect to the laws governing foreign investment by U.S. persons in foreign real estate: (1) the types and extent of restrictions imposed on investments by U.S. persons, and (2) the institutional and legal frameworks utilized by foreign countries.

Barriers Imposed on Investment by U.S. Persons in Foreign Real Estate

In summary, substantial procedural and substantive restrictions are imposed on U.S. persons attempting to invest in foreign real estate. The line between a procedural and substantive restriction sometimes is blurred.

In some countries, such as Belgium, the Netherlands, and the United Kingdom, virtually no restrictions, requirements for approval, or even reporting apply to investments by U.S. persons in foreign real estate. In France, although prior authorization may be required in some situations, the purchase of real estate through a notary enables a foreign investor to circumvent the requirement of prior authorization. In Germany, the authority of the Federal Government to require prior approval to be obtained by nonresidents wanting to acquire real property is not yet exercised.

In Saudi Arabia, many types of real estate investments are allowed, provided that either Royal or ministerial approval is obtained. No standards or guidelines appear to exist to limit the discretion of the authorities.

Foreign persons residing abroad who want to acquire real estate in Switzerland must obtain a permit from the competent cantonal authorities. The law provides that a permit is refused unless the applicant can show a legitimate interest--which includes the use of real estate primarily for a trading, manufacturing, or other commercial establishment, and under some circumstances for personal use. Foreigners also are allowed to acquire real estate interests in areas relying on tourism.

In Brazil, a U.S. person wanting to acquire agricultural land encounters both procedural and substantive restrictions. Similarly, in Canada, both procedural and substantive restrictions are encountered on the Federal level. The operation of the Foreign Investment Review Act and especially its application to real property serve as a model of foreign investment legislation. On the provincial level in Canada, restrictions are imposed through taxing and limiting the amount of land which can be acquired.

In Mexico, although the restrictions on foreign investment in real estate have a long history, are enshrouded in the Constitution, and are abundant, a U.S. person can nevertheless become a beneficial owner of real estate, and can derive a substantial profit therefrom.

Institutional and Legal Framework

This chapter may be instructive in its description of the institutional and legal arrangements of the various foreign governments. For instance, the collection of information and registration forms appear sophisticated and detailed in Mexico, Brazil, Germany, and Canada. However, the procedures and decision-making appear more flexible in Saudi Arabia.

The definitions of the legislation in these countries may be instructive to U.S. legislators from a comparative law perspective. For instance, the requirement in the Mexican Investment Law of 1973 that foreigners hold only nominative shares, and the similar requirement in Brazilian Law 5,709 of 1971, may provide examples of a mechanism to solve the second- and third-tier problem faced now by the U.S. Congress in trying to ascertain who really has beneficial ownership of U.S. farmlands.

The legislation and interaction of regulations in countries such as Germany, Switzerland, and Canada can be investigated more fully to ascertain what may be potential interaction in the United States between Federal and State Governments regulating foreign ownership, provided the unique constitutional status and legal culture of these State and Federal Governments is considered.

Other relevant elements of the laws concerning foreign investment in real estate in the 11 countries considered in this chapter include the recognition afforded to real estate transactions not in accordance with these laws and the sanctions applicable to such violations.

Chapter 5

TECHNICAL, ECONOMIC, ADMINISTRATIVE AND LEGAL FEASIBILITY OF SINGLE-PURPOSE MONITORING SYSTEMS

Lewis J. Krulwich and David L. Ziskie*

I. SUMMARY OF ACTIVITIES AND FINDINGS

A. Purpose and Background of the Project

Over the past several years, the Federal Government, State and local officials, and the public have expressed their concern that U.S. real estate is being increasingly acquired by foreign persons or foreign-controlled business entities. Questions have been raised concerning (1) the magnitude of foreign investments; (2) the identity, location and other characteristics of both investors and investments; and (3) the impacts of these investments on the real estate market, national and local land use, and the overall economy.

Answering these questions, however, has been difficult because of the general lack of information on domestic landownership and use. In 1975, the U.S. Department of Agriculture prepared a report on foreign investment in real estate for the Department of Commerce (as part of a larger study of direct foreign investment in the United States). The report concluded that "adequate data on the volume and character of foreign ownership of U.S. real estate"1/ is lacking, due largely to the "inadequacies of the recordation systems and the confidentiality and anonymity aspects of real estate transactions."2/

On October 11, 1976, the President approved the International Investment Survey Act of 1976 which provides for:

> ....a study of the feasibility of establishing a system to monitor foreign investment in agricultural, rural and

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*/ Price Waterhouse & Co., Office of Government Services

1/ U.S. Department of Commerce, Report to the Congress Foreign Direct Investment in the United States, Volume 1: Report of the Secretary of Commerce to the Congress, April, 1976, page 182.

2/ Ibid.

urban real property, including the feasibility of establishing a nationwide multipurpose land data system....3/

An interagency committee chaired by the Office of Management and Budget subsequently assigned responsibility for the study to the Department of Agriculture.

The purpose of this report for the Department of Agriculture is to determine the feasibility of two alternative approaches to monitor foreign investment in U.S. real estate at the Federal level: (a) the establishment of a new system of direct registration of foreign real estate investment with a Federal agency, and (b) the use of information currently being collected by Federal Government agencies.

The direct Federal registration system (Scenario I) would be a system designed exclusively to collect information on investment by foreign persons or entities in U.S. real estate. The use of existing Federal reporting requirements (Scenario II) envisions employing current Federal agency data collection efforts, which are required for other Federal agency regulatory or monitoring purposes and activities, to provide data on foreign investment in U.S. real estate. Our analysis of Scenario II also includes an assessment of the feasibility of making potential improvements to currently performed data collection activities of these agencies.

The International Investment Survey Act of 1976, which authorized this feasibility study, is one among several recent Federal and State initiatives concerning both general foreign investment in the U.S. and investments in U.S. real estate, in particular. The following are brief descriptions of some of these other actions:

- The Foreign Investment Study Act of 1974 (P.L. 93-479). In response to the provisions of this Act, the Office of Foreign Investment in the United States (OFIUS), Department of Commerce, conducted a comprehensive study of direct foreign investment in the United States (10 percent or more foreign ownership of voting shares or equivalent interest). The Commerce Department's Bureau of Economic Analysis (BEA) also conducts comprehensive periodic surveys of foreign direct investments in the United States. The surveys concentrate on businesses which have foreign ownership and require reporting of an extensive set of economic data pertaining to the impact that these firms have on the U.S. economy. Other activities conducted in response to the Act include studies on the portfolio investments (investments of less than 10 percent) of foreigners by the Treasury Department.

3/ International Investment Survey Act of 1976, P.L. 94-472, October 11, 1976.

- <u>The Agricultural Foreign Investment Disclosure Act</u> (AFIDA) of 1978 (P.L. 95-460). The 1978 Act was passed based on concern regarding the purchase of U.S. farmland by nonresident aliens. The AFIDA was enacted on October 14, 1978. This law requires that all nonresident alien individuals or entities controlled by such individuals owning or having any interest (other than a security interest) in U.S. farmland or timberland submit information to the Secretary of Agriculture regarding various characteristics of the property that they own and the nature of the investment that they have in this land.

- <u>State laws</u> have been passed in Iowa and Minnesota which require the registration of foreign ownership of agricultural land. These States require nonresident aliens and various business entities controlled by nonresident aliens to file annual reports on their agricultural land holdings.

B. Scope of the Study

The scope of our study is defined as follows:

1. This study assesses the feasibility of (a) establishing a direct Federal registration system (Scenario I), and (b) using existing Federal data collection activities to monitor foreign ownership of U.S. real estate (Scenario II).

This feasibility study evaluates two potential approaches to monitor foreign investment in U.S. real estate. The scope of the study does not recommend adoption of a particular approach or system. We have, however, provided observations on the design aspects of each scenario. We also compare the two systems in the context of their ability to satisfy the objectives of monitoring the magnitude of foreign investment in real estate and to distinguish particular characteristics of foreign investors and their interests in real estate, (the number of parcels, the location and use of such parcels, etc.).

2. Four basic types of criteria are used to analyze the feasibility of the alternative scenarios: technical, economic, administrative and legal.

The assessment of technical data requirements includes the extent to which particular real estate investor or investment information can be effectively and efficiently obtained and utilized. Assessment of the administrative characteristics focuses on the advantages and disadvantages of various organizational, staffing, and procedural aspects of obtaining, and tabulating and analyzing the data received. Economic analysis is concerned with the costs to the Government of implementing the information systems described. Economic analyses for both scenarios are based upon such factors as estimates of the annual number of real estate transactions completed by foreign persons. Precise data on the number of total real estate transactions and the number of transactions associated with foreign persons that occur in any given year generally was unavailable. Therefore, estimates of real estate transaction volumes were developed from such sources as: the U.S. Department of Agriculture, the U.S. Department of Commerce (Bureau of the Census), the American Land Institute, and the National Association of Realtors. Evaluation of the legal aspects of each alternative involves the legislative initiatives and/or administrative rulemaking required to implement each scenario. Constitutional and other such legal issues are not considered in this study.

3. The study considers all types of U.S. real estate.

This study examines the feasibility of monitoring foreign investment in urban and rural real estate, both commercial and residential. Consideration of real estate in this study includes land and land improvements including buildings and appurtenances; also included are various property rights, e.g., cutting rights, grazing, water, and mineral

rights.4/ The study considers "real estate" to be all real property within the United States and the tangible and intangible property associated with each parcel of real property.

4. A "foreign person" who invests in U.S. real estate is defined as an individual who is not a citizen of the United States including any corporation, company, etc. which is controlled or substan-tially controlled by foreign persons or interests.

A "foreign person" may be any citizen of a foreign nation or a nonresident alien of the United States. The definition of foreign person also includes any corporation, company, association, firm, partnership, society, joint stock company, trust, estate, and other similar entity that is: (1) organized outside the boundaries of the United States and its territories by a foreign person, nation, government, or some combination thereof, and (2) organized in the United States but is substantially controlled by a nonresident alien of the United States, foreign governments, or any combination of such individuals or governments. This concept of a foreign person is parallel to that used in AFIDA regulations.

5. The results of this study are based upon general fact-finding, interviewing within the community that services foreign investors, and analysis of data collected.

Fact-finding and interviewing were conducted in the Federal Government, appropriate State and local governments, and the private sector (e.g., lawyers, real estate consultants, and brokers). Surveys of foreign investors or audits of foreign investment were not conducted. However, current Federal surveys of foreign investment in the United States (including real estate) such as those conducted by the Department of Commerce, Bureau of Economic Analysis, were utilized as important sources of information.

4/ A Dictionary for Accountants, 4th Edition, s.v. "real estate" by Eric L. Kohler.

C. Activities Conducted During the Study

This section briefly describes the major activities undertaken by the study team to assess the feasibility of implementing a Federal monitoring system for foreign investment in U.S. real estate.

1. Review of existing direct registration systems--Several governmental units have established systems for direct registration of foreign investment in real estate. As part of our analysis of Scenario I, four such systems were identified and analyzed with regard to their performance vis-a-vis technical, administrative, and economic feasibility criteria. The four systems reviewed were:

- o The State of Iowa's farmland registration requirement for corporate and nonresident alien owners.
- o The Department of Agriculture (AFIDA) requirements established for registration of nonresident alien ownership of U.S. agricultural land.
- o The Department of Commerce, Bureau of Economic Analysis, reporting requirements for existing foreign investments in U.S. businesses and establishment or acquisition of new entities.
- o Selected analysis of several Canadian provincial regulations, particularly Ontario's, which require registration of foreign-owned property. Also included were aspects of the Canadian Foreign Investment Review Act, which delineates conditions under which foreign businesses can acquire existing Canadian firms or establish new affiliates in Canada.

On-site visits were made to interview the administrators of the Iowa, AFIDA and Bureau of Economic Analysis reporting systems. Canadian officials also were contacted to supplement our analysis of written materials available concerning the operation of the real estate information systems in Canada.

2. Federal agency interviews and data search--In connection with assessing the feasibility of Scenario II, Federal agencies which were likely to be collecting information on foreign investment in U.S. real estate were identified. Several sources were used for this purpose,

including two reports previously produced by Price Waterhouse & Co. on Federal data collection activities of foreign investment in the United States. 5/

This screening activity resulted in a list of Federal departments/agencies which could potentially collect relevant information. Interviews then were conducted at each of these organizations. Specific offices visited were located within the Departments of Agriculture, Treasury, Commerce, Interior, Housing and Urban Development, Energy, and State and the following independent agencies: the Securities and Exchange Commission, Civil Aeronautics Board, General Accounting Office, Federal Trade Commission and Federal Reserve Board. The purpose of the interviews was to obtain detailed information related to the purpose, scope, and use associated with the present collection of data by these entities. The results of these efforts formed the core of our examination of the feasibility of Scenario II--the utilization of existing data collection activities to monitor foreign investment in U.S. real estate.

Private sector interviews--To obtain information concerning the foreign investor role in a potential reporting system, a selected number of "intermediaries"--real estate brokers, attorneys, and bankers who have extensive contact with and knowledge of foreign investors--were interviewed. The purposes of these discussions were to:

- Determine the extent to which foreign investor behavior (in terms of types of investments, means of investing, ownership structures used, etc.) might influence the design or composition of a Federal reporting system (technical and administrative criteria).
- Estimate the degree of compliance that various types of foreign investors would give to a Federal registration system that required beneficial ownership disclosure (technical criteria).
- Estimate the cost impact that a Federal registration system would have on foreign investors and intermediaries required to report under such a system (economic criteria).

The results of the interviews combined with the review of other material available on these issues have become part of the assessments made regarding the performance or feasibility of a direct registration system discussed in Section II.

5/ "Report on U.S. Government Data Collection Activities with Respect to Foreign Investment in the U.S.", Price Waterhouse & Co., February, 1975, and "Report on Federal Government Agency Sources of Data on Foreign Investment in the U.S.", October, 1975.

4. <u>Meetings were held and contact maintained with other Department of Agriculture study team members</u>--This project represents one part of the overall effort of the Department of Agriculture to study foreign investment in U.S. real estate. Meetings were held and ongoing contact was maintained during the course of the project with the Department and with other private contractors engaged by the USDA. Thereby, attempts were made whenever possible to share information sources and to assure that common assumptions were used by the various participants in the study.

5. <u>The results of the project were compiled and presented to the USDA</u>--The overall results of the fact-finding and feasibility analyses of Scenarios I and II were presented in a draft report to the Department of Agriculture. The draft report was reviewed by the Department and selected specialists, after which our final report was prepared and submitted.

D. Summary of Findings and Conclusions

This section presents our major findings and conclusions. We first present those findings which pertain to both scenarios. Following these overall findings are those specifically relating to Scenario I and to Scenario II.

1. Overall conclusions regarding both scenarios:

   - There are a range of alternative approaches available with which to monitor foreign investment in U.S. real estate. Selection of a specific alternative should be based primarily on the objectives of the Government regarding the potential use of the information and the need for particular types of data.

The key determinants of the characteristics of information systems are the objectives and expected uses of the system. In terms of a real estate investment monitoring system, decisions regarding the primary objectives of the system would have major implications for the scope and level of detail of real estate and investor information needed, how the system is administered and the resulting implementation costs. It is therefore important for the objectives and projected uses of the system to be clearly developed prior to design and implementation of monitoring activities.

   - Either scenario should be able to capture most of the foreign investment in U.S. real estate, in terms of total worth.

The community of intermediaries--lawyers, brokers, investment counsellors, etc.--which services foreign investors is in agreement that the majority of foreign investment in U.S. real estate is being made by large corporations and institutions whose investments could be identified under either monitoring system. Foreign individuals--some of whom, because of currency exchange restrictions or other reasons have motives for maintaining the privacy of their investments, even when faced with a U.S. Government reporting requirement--are considered to represent a minority.

   - Some important information would only be available to the public from a direct registration system, particularly data on individual land parcels and owners, and on-going transaction information.

Data on the real estate holdings of individual foreign investors (for other than agricultural land) is not now available to any significant extent. Existing Federal Government agency sources could not be utilized to obtain this information without making major changes to the nature and objectives of these data collection activities.

- <u>There are several important limitations on the ability of any monitoring system to collect complete information on foreign investment in real estate.</u>

Foremost among these limitations are: a) the ability to determine the current value of existing real estate holdings due to the rapidly changing character of real estate prices, the improvement or deterioration of depreciable assets, and the difficulties of assigning dollar valuations to various types of real estate; b) data on partial property interests--such as leases, mineral and other property rights, easements, partial title ownership, etc.--are difficult to assemble; and c) in some instances, identification of beneficial ownership, control or interest will be difficult since some forms of ownership preclude identification (e.g., bearer stock in a company) and in other cases the sheer complexity of ownership structures may defeat even good faith efforts to comply with beneficial ownership identification.

- <u>Analyses of the information received would be constrained by inadequacies in both the data submitted and the information available about total domestic real estate investment.</u>

In addition to the problems created by the data limitations mentioned above, attempts to perform various analyses (e.g., community impact, land price impact, economic analyses, etc.) of foreign investment in U.S. real estate would be hindered by two additional factors:

a) Difficulties in identifying errors and gaps in the data received, because of the huge number of possible entries (over 88 million separate privately held land parcels exist) and the lack of usable cross-checking information.

Only a system which integrates foreign investor data collection with other real estate data collection--such as for transfer tax or title recording purposes in Iowa or Ontario --could feasibly verify the information being collected on foreign investor real estate interests. Effective verification of data may be required for the conduct of useful analyses. Given the non-Federal nature of real estate recordkeeping and taxation in the United States, only a system administered by the States or local governments could feasibly accomplish this.

b) The absence of comparable data on domestic ownership--which accounts for the majority of the real estate--would make it difficult to assess the share of total real estate held by foreign investors or the impact of foreign investment on the U.S.

- <u>The economic costs of implementing a direct registration system are much greater to both the Government and foreign investor reporters than utilization of existing reports</u>.

If the objectives of a monitoring system can be satisfied by the accumulation of aggregate data, the utilization of existing and/or modified reporting systems would be considerably more cost-effective than the establishment of a direct registration system. Similarly, if the scope of a direct registration system could be constrained as to particular real estate types, sizes, uses, or other limiting characteristic(s), the private and public sector costs of the system could be reduced. An added benefit in the latter case would be the ability to gather more specific data in the areas selected which could be more readily checked for accuracy and completeness.

- <u>Neither scenario could be fully implemented within existing regulatory and legislative authorities</u>.

Implementation of Scenario I, a direct registration system, would require specific legislative authorization. Utilization of existing systems (Scenario II) would require additional rulemaking procedures and interagency agreements if the improved data quality and scope envisioned in the Scenario were to be achieved.

- <u>Either system would be most effectively administered if a single government organization were given the mandate and resources to monitor foreign investment in U.S. real estate</u>.

Present efforts to monitor foreign investments in real estate are conducted by various Federal agencies and usually are of secondary importance to the agencies gathering the information. For example, the data collected by the Bureau of Economic Analysis on real estate is of secondary interest to it, compared with the balance of payments and GNP data collected by its surveys of foreign investors. Combining the responsibilities in a single agency would permit more effective overall analyses and reporting to the public.

2. <u>Summary of findings related to a direct federal registration system (Scenario I)</u>:

Exhibit I-1 provides a summary of our findings regarding the feasibility of a direct registration system. The following points are our specific conclusions regarding Scenario I:

- <u>There are many feasible alternatives which could be used to establish a direct registration system</u>.

The design of a direct Federal registration system involves many complex decisions and considerations. Given the large number of alternatives, the objectives and intended uses of the system must be defined clearly in advance.

There are several types of alternative systems already in operation which could serve as models for establishment of a comprehensive direct registration system (four of these existing systems have been analyzed in Appendix 1). However, no single one of these existing systems is completely appropriate for a comprehensive national system because of the specialized scope and purpose of each of these systems.

- <u>It is not feasible to design a direct Federal registration system which will achieve 100 percent reporting compliance.</u>

Any Federal requirement for registration of real estate investments will fall short of full compliance because of the complex and dynamic nature of real estate investment transactions with the attendant difficulties of effectively monitoring reporting compliance, and because of the likely desire of certain investors to avoid governmental or public disclosure of their investments.

- <u>The design and implementation of a direct registration system for urban real estate investments is considerably more difficult than one for agricultural real estate</u>.

The greater complexity of an urban real estate registration system is due to several factors, including: (a) the larger number of such investments; (b) the greater volume of transactions because of the relatively high level of property turnover; (c) the often complex legal issues involving leases, easements, shared ownership, etc.; and (d) the absence of an appropriate Federal agency presence in most urban areas.

- <u>There are several technical, administrative and economic advantages which could be gained from targeting a registration system to particular real estate types, uses, or other limiting characteristics</u>.

Examples of these advantages are: (a) the ability to increase the level of detail of information requested as the range of reporters narrows (e.g., to collect specific operational data); (b) improved ability of the data collection agency to identify gaps and errors in

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO I

PROJECT CRITERIA	FEASIBILITY SUMMARY
1. Technical Factors	From a technical viewpoint, there are many feasible alternative approaches to the design of a monitoring system. These alternatives should be evaluated based on a clearly stated set of system objectives, which should determine the requirements for particular types of data, frequency of reporting, and analyses to be conducted. It is generally feasible to design a system to monitor overall foreign investment magnitudes or individual transactions (purchases or sales); however, it is difficult to design a system which will permit economic analyses involving the impact of foreign investment on the general economy or particular areas. Such a system would have to include data on <u>all</u> real estate investment, domestic and foreign. It is feasible to capture most of the potential data elements on owner and real estate characteristics. Two important exceptions are: 1) beneficial ownership information, which in somes cases either cannot or will not be able to be collected; and 2) accurate estimates of current real estate values.
2. Administrative Characteristics	Highest efficiency and effectiveness appears to be attainable from using a single agency already involved in analyses of foreign investment issues to implement the system. Verification of the accuracy of forms submitted and compliance with reporting requirements would be difficult and expensive due to lack of cross references and labor-intensive nature of assuring compliance.
3. Economic Costs	Precise costs would be determined by the specific reporting requirements established. Based on volume estimates presently attainable, this could range between \$4 to \$8 million to the Government annually for reporting

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO I (cont.)

PROJECT CRITERIA	FEASIBILITY SUMMARY
3. Economic Costs (Continued)	of new transactions, with an additional $1.5 million cost incurred for comprehensive surveys of existing holdings.6/ Foreign investor costs would vary with the number of holdings and transactions of each investor. Compliance costs could be high for investors with numerous holdings.
4. Legal	Legislation specifically authorizing direct registration requirements likely would be needed to establish a system.

6/ These estimates are based on the methodology discussed in Appendix 2 and exclude agricultural land (already covered by AFIDA) and non income producing land. There also was no allowance made for the economic impact of requiring reporting from foreign-owned fiduciaries (e.g., banks). The extent of real estate controlled but not beneficially owned by these fiduciaries is unknown.

the information received as the number of reporters lessens and agency staff knowledge of activities, data sources, etc. in particular areas increases; and (c) operating costs can be reduced if the number of reports filed is diminished. For example, exempting property owned by foreign investors which is used for vacation or residential purposes and is not connected with the production of income could reduce government costs.7/

The options for reporting range from a one-time survey to annual reporting and/or ongoing reporting of each transaction. Besides the cost differences involved, increasing the frequency of reports filed will result in more current and useful data.

- <u>Legislation authorizing a comprehensive direct registration and data dissemination system of individual transactions, parcels, and owners would be required for such a system to be established.</u>

Current statutory authority does not exist for establishment of a reporting requirement that would result in disclosure of individual real estate parcel and owner information, as called for by the project criteria. If the objectives of the system were confined to measuring total magnitudes and by-State locations of foreign investments, existing authority of the Bureau of Economic Analysis for the release of aggregate data could be utilized.

- <u>A comprehensive system which balanced technical data collection objectives and economic reasonableness would cost approximately $4 to $8 million to implement annually. An additional $1.5 million would be incurred for comprehensive reporting of existing holdings.</u>

These estimates pertain to the direct costs to the Government to implement a comprehensive monitoring system and do not include various direct and indirect reporter costs. The estimate is based on the model system developed in Section II for Scenario I and reporting volumes determined using the methodology discussed in Appendix 2 (see footnote 6).

7/ By eliminating such parcels the reporting universe would be reduced by over 50 percent. By implication, costs to the Government also would be significantly reduced.

3. <u>Summary of findings related to use of current Federal agency data collection activities (Scenario II)</u>:

Exhibit I-2 represents a summary of our findings regarding the feasibility of a direct registration system. The following points are our specific conclusions regarding Scenario II:

- <u>While a substantial amount of information is collected by various agencies regarding overall foreign investment in the United States, there is no comprehensive information reported concerning real estate transactions and the individual interests of foreign investors</u>.

The present foreign investment data collected by most Federal agencies are focused on the degree of control and ownership by foreign investors in the industries these agencies regulate, not on the real estate held as a consequence of being in the business regulated. Other agencies which do collect real estate data report it only on an aggregate basis (e.g., Department of Commerce, Bureau of Economic Analysis), or for a single type of real estate, (e.g., the AFIDA's agricultural land reporting system).

Only the Office of Foreign Investment in the U.S. public record monitoring of real estate transactions provides some information on the ownership, value, use, location, etc., of foreign investment in urban land. This source is limited since it provides no information on important real estate data aspects such as current holdings and leases, or for purchases which escape public attention. Acquisition of real estate through investments in on-going businesses would likely not be specifically identified by the Office of Foreign Investment in the U.S. While real estate information on a by-investor basis is collected by the Bureau of Economic Analysis, it is legally prevented from disclosing individual ownership information.

- <u>The significant real estate data that are now collected are concentrated in a few agencies</u>.

The Bureau of Economic Analysis and the Office of Foreign Investment in the United States within the Department of Commerce collect information on a broad range of real estate, including mineral rights. The U.S. Department of Agriculture, through the new AFIDA requirements, now collects information on foreign investment in agricultural land in what is a limited purpose direct registration system. The Interior Department's Bureau of Land Management (BLM) maintains investor information for the leases and use permits it grants on the 448 million acres of Federal land that it oversees, and the income tax records of the Internal Revenue Service contain certain elements pertaining to real estate holdings and sales.

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO II

PROJECT CRITERIA	FEASIBILITY SUMMARY
1. Technical Factors	In general, it is not feasible to utilize current data collection activities to collect all potential data on foreign investors or investments. The technical data collection limitations preclude the ability of Scenario II to meet all potential system objectives. Only the U.S. Department of Agriculture's AFIDA represents such a comprehensive approach. Scenario II would enable the collection of data on major investments and the reporting of aggregate investment totals or publicly available transaction data. At the current time nonagricultural real estate data collected generally are limited to major investments. Beneficial ownership identification is limited to the first tier of investment holder. The BEA reports only aggregate data to the public; transactions or identification of investors is statutorily confidential. The OFIUS does collect and report publicly known transactions. It is feasible to expand coverage of current reports by lowering the minimum size of investments reported and increasing analysis reported. If statutory constraints were removed, data would be available on the value, size and use of real estate owned by individual firms but not on individual parcels. Agricultural real estate data are now being collected and reported on an individual parcel and owner basis, for both existing holdings and new transactions under the AFIDA requirements. Because the AFIDA system is just beginning, the completeness of the data, number of reports, and other data aspects are not known.
2. Administrative Characteristics	Data collection must remain within the existing framework of a variety of agencies (IRS, BEA, USDA). The analysis and reporting feasibly could continue on the multi-agency approach or be centralized in one agency. From an effectiveness perspective, there are advantages to the centralized approach.

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO II(Cont.)

PROJECT CRITERIA	FEASIBILITY SUMMARY
3. Economic Costs	Costs presently associated with the collection of foreign investment information cannot be calculated given the number of agencies involved and various purposes for collection of data by those agencies. Added costs to the Government would be incurred if new data elements were collected, an analytical staff was established, and/or special surveys were performed.
4. Legal	Changes in foreign investor reporting thresholds would require Federal rulemaking procedures. Additional information required on IRS forms must be approved by OMB and IRS. Obtaining approval may present difficulties. Removal of BEA confidentiality constraints would require additional legislation.

- The most comprehensive information available from existing sources is on agricultural and other rural land.

Agricultural land represents less than a third of U.S. real estate in terms of total worth.8/ However, most of the concern about foreign investment ownership has focused on this type of real estate and the extent of the data collected by the Federal agencies reflect this concern. The AFIDA reporting requirements will provide a substantial amount of foreign investor information regarding agricultural land holdings and transactions.

- The aggregate data collected utilizing existing systems likely would include most of the foreign investment in U.S. real estate being undertaken and could provide useful information for analyzing the overall magnitude, by-State concentration and by-industry focus of these investments.

The data could permit measurement of the total extent of foreign investment in U.S. real estate and could establish some important base points from which to measure the future growth of these investments. For example, the Bureau of Economic Analysis estimates that it now collects 85 to 90 percent of the existing foreign investment in the U.S. real estate, in aggregate form. Data gathered from IRS tax forms on the book value of land owned by foreign-owned firms could be compared on a yearly basis to estimate its growth and could be compared to domestically owned companies on a by-industry basis.

- Utilization of existing information, even with several improvements (as suggested in Scenario II), could be done at a small incremental cost compared with a direct registration system.

The costs of establishing a unit to analyze the existing data, conduct studies in selected areas, and reimburse certain data collecting agencies would be approximately $200,000 to $300,000 per year. This figure assumes three staff persons fully committed to the project, reimbursement costs to other agencies for summarizing data they collect, and approximately $100,000 to $200,000 per year for special studies in selected areas which would be conducted by the BEA under its current authority. These special studies could investigate specific areas of concern (e.g., ownership of certain natural resources) and provide accurate aggregate data in a very cost-effective manner.

8/ Calculated from "Foreign Investment in U.S. Agricultural Land," Committee on Agriculture, Nutrition and Forestry, U.S. Senate (January 1979) p. 11, and "Land Rush" by Peter Meyer in *Harper's* magazine, January 1979, p. 52.

II. DIRECT FEDERAL REGISTRATION OF FOREIGN INVESTMENT IN U.S. REAL ESTATE (SCENARIO I)

A. Definition of a Model Direct Federal Registration System

This section addresses the feasibility of establishing a direct registration system to monitor foreign investment in U.S. real estate (Scenario I). The steps taken to evaluate this alternative are:

1. Development on a conceptual basis of the basic elements of a direct registration system by means of a decision model (Exhibit II-1);

2. Summarization of the major issues associated with each element in the model;

3. A detailed discussion of each of these major issues with the alternatives available to address the problems raised by the issues;

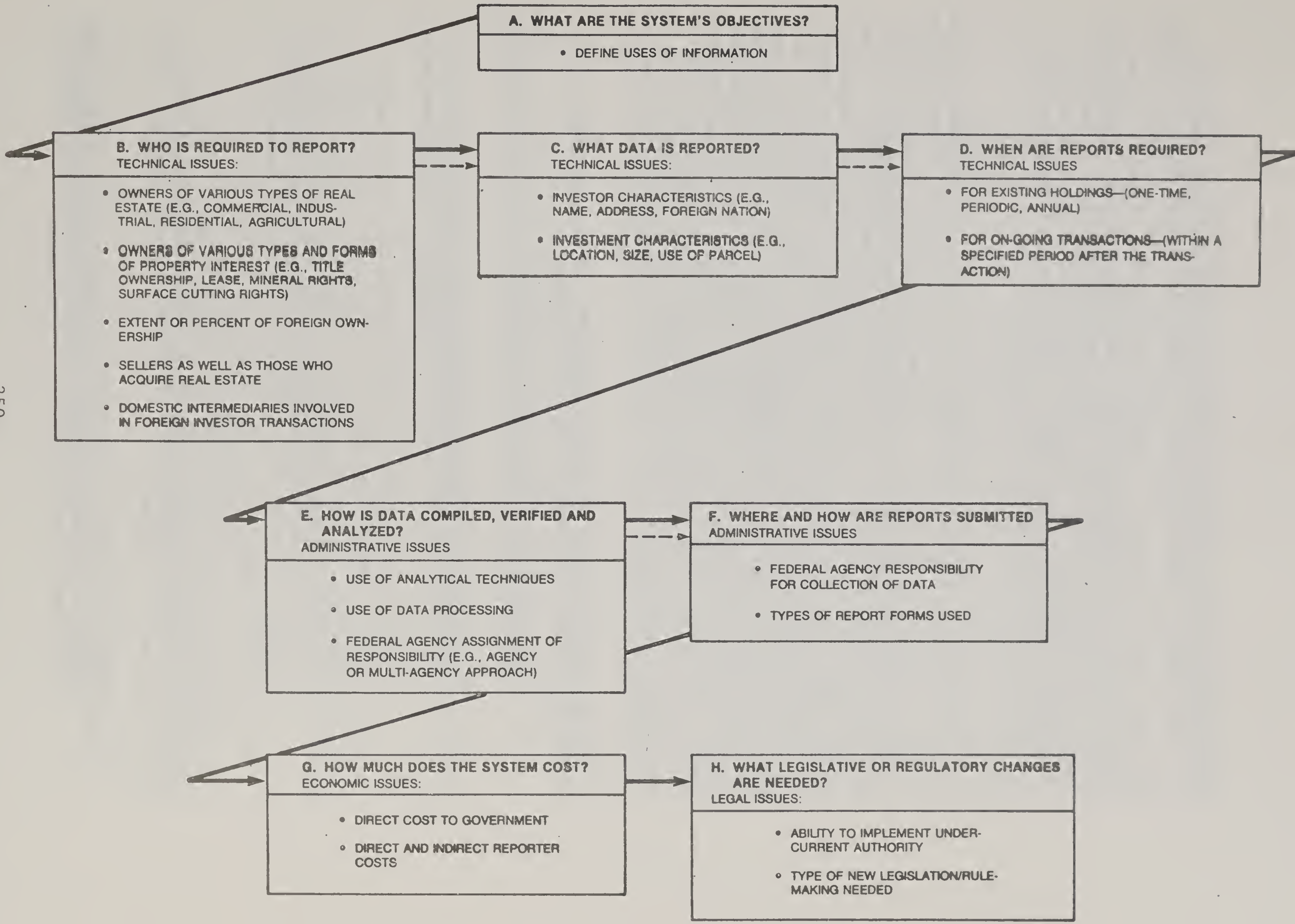
4. A short summary of the feasibility of Scenario I based on the project criteria; and

5. A more detailed assessment of the feasibility of the performance of the various alternatives available to implement the Scenario.

1. Description of a Decision Model

There are many alternative methods available for direct Federal registration of foreign ownership of U.S. real estate. While the approaches share some common characteristics, the selection of a particular system requires choices regarding specific information required, data collection procedures, Government agency roles and other similar questions. These factors are illustrated in Exhibit II-1, which incorporates the

DIRECT FEDERAL REGISTRATION SYSTEM DECISION MODEL



four project criteria elements--technical, administrative, economic and legal--into a sequential direct registration system decision model.

The major characteristics of a Federal registration system, outlined in Exhibit II-1, are discussed below. Accompanying each category is a short description of the main issues associated with it. The purpose of this section is to present the choices which must be made in an integrated and coordinated manner, and to serve as the basis for the detailed issue discussion which follows.

a. What are the system's objectives?--The first step in resolving the issues outlined in Exhibit II-1 rests in determining the primary objectives of collecting information. If the major purpose of establishing a registration requirement is to measure the overall magnitude of foreign real estate investments in certain types of real estate, a system utilizing a limited number of questions on aggregate foreign-owned real estate size, type, and value could be implemented. However, if there are numerous purposes and uses anticipated for such a system--such as to identify where the investments originate, or to provide local communities or Federal officials with ongoing information on individual foreign purchases, submission of a much more extensive set of information would be required. If performing economic analyses on the employment impact, land price impact, etc., of these investments were the objectives of the system, information on the domestically held as well as the foreign investor-owned real estate would be required for purposes of comparative analysis.

Following are some of the potential objectives for a monitoring system of foreign investment in U.S. real estate:

- Identification of the overall magnitude of foreign investment in real estate;
- Determination of amounts of real estate held by particular individuals and the specific locations of foreign investments;
- Ongoing identification of new acquisitions by foreigners in specific communities; and
- Utilization of the information to perform national, State, or local socioeconomic analyses, such as on the impact of foreign investment on land prices, control of community affairs, etc.

b. Who is required to report?--Defining what is meant by "foreign investor" or "foreign interest" for reporting purposes presents several issues which must be resolved:

- Should the holders of foreign interests in every type of real estate be required to report, or can certain kinds, such as non-income producing property, be excluded?

- o Should the holder of every type of "interest" in real estate be required to report? Some property has many "owners"--different owners of rights for minerals, water, grazing, air rights, leases, and subleases.

- o Some minimum foreign ownership threshold could be set to minimize the reporting and data collection burden being caused by insignificant foreign ownership (e.g., one share of General Motors). What should this level be--1/5 percent, 5/10 percent, or some greater amount? Also, some corporate ownership chains may have individual links with ownership that meets the threshold, but on an aggregate basis the interest may be quite small.

- o Should reports be required by foreign-owned entities which control the use of real estate, even though they have little or no beneficial interest in it? There are approximately 250 foreign banks licensed to operate in the United States and a substantial number of other banks partially foreign owned.9/ The trust departments of these banks often oversee domestic investor properties. If beneficial interest were the sole criterion for requiring reporting, the real estate controlled (but not beneficially owned) by these foreign-owned trusts would not be reported, even though decisions about the use, purchase, sale, and other important aspects of the real estate may be made by a foreign owned entity. On the other hand, such a requirement could be a considerable reporting burden on the banks.

- o Should reports be required for foreign owner disposition as well as acquisition of land? Unless sales are accounted for as well as acquisitions, determination of net increases or decreases in foreign investment is not possible.

- o Should domestic intermediaries (e.g., real estate brokers) be required to report? Such reporting might increase the overall level of compliance.

c. What data are reported?--There are two different issues regarding what information is reported: a) the requirements for beneficial interest identification, and b) the scope and detail of owner and real estate characteristics required.

- o To what extent is beneficial ownership reporting necessary? Beneficial ownership is sometimes not known or knowable (e.g., owner of bearer stock). Also, disclosing beneficial ownership may discourage some foreign investors from reporting at all.

9/ Foreign Banking Corporations Doing Business in the United States, Price Waterhouse & Co., October, 1978, p. 1.

- o What aspects of real estate should be reported in terms of value, size, use, date of acquisition, purpose of acquiring, location, etc.? How can "value" be consistently measured for property acquired in the past (e.g., 15 years ago) or for property that has been improved or has deteriorated since acquisition?

d. When are reports to be required?--Decisions on the frequency of reporting have a significant impact on reporter and Government processing costs as well as the timeliness and quality of the information gathered. Given these factors, should reports be required:

- o Only periodically (e.g., every 5 years);
- o Annually for every parcel owned;
- o For individual reporting of every transaction within a short time (e.g., 30 days) after the property exchanges hands;
- o One-time reporting of all holdings with annual or individual update reports filed thereafter; or
- o Some combination of the above?

e. How would data be compiled, verified and analyzed?--Issues concerning this question include:

- o There are several Federal agencies now involved in collecting and analyzing foreign investment information (e.g., the Bureau of Economic Analysis, Census Bureau, and Office of Foreign Investment in the United States within the Department of Commerce; the Agricultural Stabilization and Conservation Service, and the Economics, Statistics and Cooperative Services within the USDA). Which agency or agencies should be responsible for analysis of the data?
- o Based on system objectives, what types of analyses and reports should be prepared?

f. Where and how are reports submitted?--Some of the issues to be considered in this area are:

- o Which Federal agency should be charged with collecting the information and what collection points should be used? Models for this range from the Department of Agriculture AFIDA case of utilizing 2,700 field offices to collect the data, to submission of information to a single address, as done by the Immigration and Naturalization Service (INS) for the annual alien registration program.

- Reporting forms vary from multipage BEA reports to the postcard used by INS.

g. How much does the system cost?--Many of the questions regarding the costs of implementing the system are influenced by the earlier decisions in the model, such as in the requirements for a certain frequency of reporting (periodic, annual, etc). Specific attention, however, should be given to the types of costs listed below before the system is implemented. In addition, the type and amount of penalty to levy against noncompliers would have to be determined. Considerations regarding costs include:

- What are the direct costs to the Government of form preparation, printing, mailing, collection, tabulation, and analysis?

- What is the direct cost to reporters of complying with the reporting requirement?

- Are there indirect costs to reporters in terms of discouraging investment and revealing sensitive business information?

h. What legislative and regulatory changes are needed?--Finally, in order to implement a system, the specific legislative authority or rulemaking required to enable such a system to impose reporting requirements on foreign investors would have to be identified and proposed.

B. Detailed Discussions of Issues and Alternatives

The previous pages touched briefly on the technical, administrative, legal and economic issues to be resolved prior to implementation of a direct Federal registration system. The technical issues concern who should report, what should be reported, and when should reports be submitted? The administrative issues include how the reported data is compiled, verified, and analyzed; and where the information is submitted. The economic issue is the cost to the Government agency/agencies (taking into consideration the financial burden on the reporters), and the legal issue is what legislative or regulatory changes (if any) are needed to implement a direct Federal registration system.

The following discusses in more detail selected technical, administrative, and legal issues related to answering the questions raised in Exhibit II-1. Economic issues are not separately discussed since costs tend to be determined by the decisions made on the other issues (e.g., who reports, what is reported). They are covered in the feasibility assessments made later in this section. The purpose of what follows is to highlight the issues (and some of the complexities) that must be considered carefully before implementing a direct Federal registration system. The level of detail included in the discussion of issues is considered appropriate for an analysis of feasibility. It should be recognized, however, that further detailed study of the selected approach would have to be conducted as part of a more detailed system design.

Each issue is stated and discussed; and a potential solution(s) is then presented to resolve the issue. These solutions are not intended to represent recommendations; but are included to demonstrate a feasible approach to address the particular issue or problem.

a. Technical Issues: Who Is Required to Report?

Issue 1: Forms of ownership and/or control that should report

Besides fee title ownership--the exclusive possession of all rights associated with a given piece of real estate--there are other forms of partial ownership or control which can be held by different entities: leases/subleases, easements, mineral rights, water rights, surface cutting rights, crop purchase rights, and other use rights. There also are many forms of interests in businesses which vary in the degree to which they participate in management decisions, i.e., exercise of control, or benefit from the activities that are undertaken. Examples of these are common and preferred stock, debentures, and limited partnerships. Lastly, there are trusts and other fiduciary entities which may hold legal title to property and exercise some discretion over its use and disposition, but may not have a beneficial interest in such property. A beneficial interest in a parcel of real estate is defined in this context as one in which there is an interest, profit derived and/or an advantage realized, as distinct from legal ownership.10/ Exhibit II-2 demonstrates the complexities of real estate ownership and/or control.

There are several points to consider in light of the above when determining what forms of foreign ownership or control of real estate should be reported.

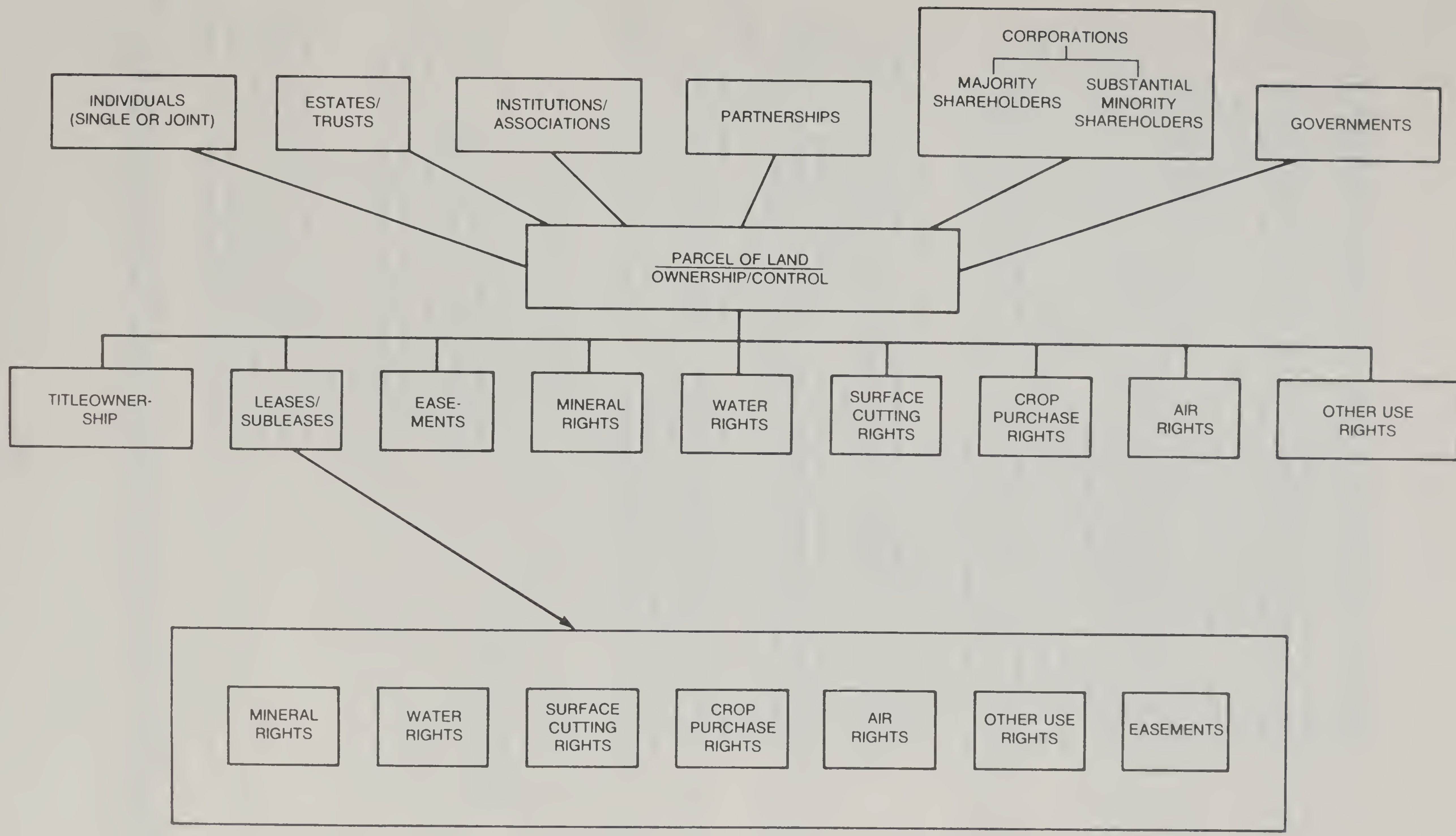
- Duplication and distortion of data: As can be seen from Exhibit II-2, many entities may simultaneously have an interest in a single parcel of land. If any one of the entities shown in Exhibit II-2 qualifies as a "foreign person," the real estate could qualify as a foreign-held property. It would, therefore, be possible to have multiple "foreign reporters" for the same parcel of property and a list of "foreign-owned real estate" many times longer than what would result from a compilation of title owners.

  In the case of a trust or other fiduciary entity, a commercial bank trust department may hold title and exercise a degree of control over a parcel of land, although it does not have a "beneficial interest" in the property. In this situation, should (1) a trust department which qualifies as a foreign person report its controlling relationship to the parcel,

10/ Black's Law Dictionary, 4th edition, s.v. "beneficial interest."

EXHIBIT II-2

COMPLEXITIES OF REAL ESTATE OWNERSHIP/CONTROL



(2) only a foreign person or entity which has a beneficial interest in the property report the interest, or (3) both of these entities be subject to reporting their relationship to the same parcel? Banking industry representatives have stated that such reporting requirements would be burdensome to a bank which is foreign owned (or in which there is a substantial foreign minority interest).11/

- Determination of property rights to report: The mere possession of property rights does not imply exercise of these rights. Reporting the possession of mineral or air rights to property on which no mines or wells are dug or over which no buildings are constructed or planned may lead to trivial or misleading data on foreign ownership. On the other hand, some land is valuable only for its water or minerals and to exclude these categories could miss a significant form of ownership unless an income or use test were employed.

- Reporting avoidance: There are several instruments which are utilized to convey property ownership or control that have the effect of masking the parties to whom control is being transferred. Examples of these are land contracts, in which title typically does not pass from the former owner to the purchaser for several years, and options to purchase. Some options can be coupled with exclusive use rights so as to place full control in the party holding the option. An option can be for any amount--even $1 so that the true purchase price contained in the option purchase. These forms of property interests are used for a variety of purposes now, but any reporting system concerned with actual property control should account for these devices so as to prevent reporting avoidance.

Issue	Potential Solutions
o Duplication and distortion of data	o To the extent possible and consistent with system objectives, require detailed form of ownership/control, location, use, etc., and information and perform data analysis to identify and minimize data duplication and distortion.
	o In the specific case of leases, make title interest and lease definitions mutually exclusive (e.g., if parcel is leased for 10 years or more, the lessee must report but not the owner).

11/ Written Comments Received Relating to Agriculture Foreign Investment Disclosure Act Proposed Rules, Robert L. Bevan, American Bankers Association.

Issue	Potential Solutions
	o Require interests with significant controlling powers in trusts and other fiduciary entities to report.
o Determination of property rights to report	o Apply a "use" test or require only holders of active interests to report. Alternatively, apply an "income" test or establish a reporting requirement if the parcel of land is connected with the production of over an established dollar amount of gross annual revenues.
o Reporting avoidance	o Include all future contingent interests (such as options to purchase and land contracts) as required by the AFIDA regulations.

Issue 2: The extent of foreign interest or percent of foreign ownership required for reporting

Requiring the reporting of all property with any foreign investor interest is not feasible. To do so would require companies with one share of stock in foreign hands to list data on all their holdings, clearly an infeasible requirement.

- Establishment of a minimum ownership threshold. In light of the need to set a minimum ownership interest level, the question becomes one of selecting an appropriate percentage to capture significant controlling interests, but at the same time avoiding trivial reporting. The Securities and Exchange Commission (SEC) and the USDA (AFIDA) have selected five percent as the level at which the potential for significant control in a publicly held corporation and agricultural real estate, respectively, can start and should be reported. The governmental distinction for "direct" foreign investment (monitored by the Department of Commerce, Bureau of Economic Analysis) and "portfolio" foreign investment (monitored by the Department of Treasury) is set at ten percent. Alternatively, according to generally accepted accounting principals, a twenty percent or more ownership share in a corporation constitutes "significant influence" with respect to the investee corporation.12/

  The difference between publicly and privately held companies is recognized in Canada's Foreign Investment Review Act, which sets a 20 percent foreign interest threshold for

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12/ American Institute of Certified Public Accountants Professional Standards, AC§ 5131.17, Current Text as of July 1, 1977, p. 9379.

privately held companies versus 5 percent for publicly held companies.

The question of what form of ownership/control is included in the percent established as a threshold for reporting is an ancilliary issue. The Bureau of Economic Analysis, for example, considers 10 percent ownership of voting shares of stock in a corporation as the test for meeting the reporting threshold. However, if a foreign person meets this test, he must report all forms of equity interest in the corporation. Equity, in this context, is any right or claim to the assets of a corporation, including debt (e.g., debentures) which carry with them control implications.13/

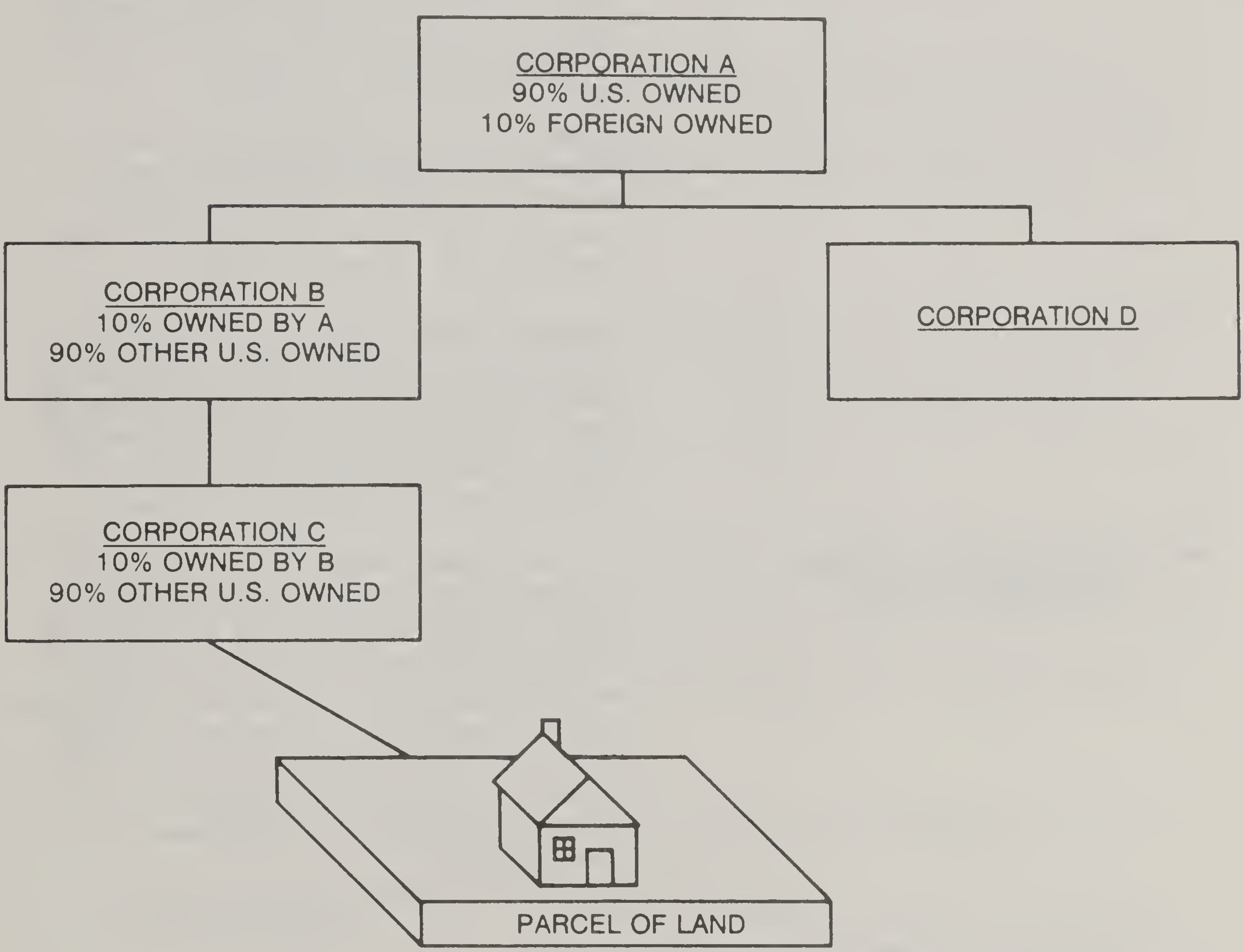
- Reporting Involving Ownership Chains: Another example of property control which should be considered in the context of reporting requirements is the chain ownership of a parcel of land. Exhibit II-3 illustrates an example of chain ownership. In the exhibit, Corporation C is partially owned by Corporation B, which is, in turn, partially owned by Corporation A. If a significant percent of Corporation A is owned or controlled by a foreign person, the parcel of land owned by Corporation C may actually be controlled by Corporation A. The parcel could potentially qualify as "foreign-owned real estate". On the other hand, in this example, Corporation A owns only .1 percent (i.e. one-one thousandth) of the parcel held by Corporation C.

  The Department of Commerce, Bureau of Economic Analysis, takes the approach of looking only one step up on the chain of corporate ownership. In this case, only Corporation C and Corporation B would be considered and no reporting would be required. The AFIDA, on the other hand, considers control of a parcel of agricultural land and authorizes consideration of the entire corporate ownership chain.

Issue	Potential Solutions
o Establishment of minimum ownership threshold	o Require a corporation (or other publicly owned entity), the voting shares of which are significantly owned, controlled or dominated by a foreign person to report. Although establishing a percentage cutoff is somewhat arbitrary and judgmental, a reasonable approach would be to establish a ten to twenty percent

13/ A Dictionary for Accountants, 4th Edition, s.v. "equity," by Eric L. Kohler.

EXAMPLE OF A MULTIPLE CORPORATE OWNERSHIP STRUCTURE



Issue	Potential Solutions
o Establishment of minimum ownership threshold (Cont.)	threshold. Taking the cost, compliance, and system operation factors into consideration, it may be practical to lower the percentage to five percent at a later time. An alternative approach, which also would be feasible, would be to implement the system with a low threshold (e.g., 5 percent), assess the reporting volume, and adjust it upward if required because of cost or other factors. o Require a partnership (or other privately owned entity) to report if over 20 percent of the gross revenues of the entity inure to the benefit of a foreign person. o Require reporting of all equity interest, including debt with equity characteristics, in a corporation or other publically owned entity once the minimum percentage threshold (of voting shares) has been reached.
o Reporting involving ownership chains	o To the extent that foreign control is known in a corporate ownership chain, require reporting. The trade-off must be made between the need for information related to the entire chain of ownership (concept of control) vs. the burden and difficulty of such reporting for reporters and related problems of governmental enforcement.

b. Technical Issues: What Is Reported?

Issue 1: Reporting of beneficial ownership

It is the consensus of real estate specialists interviewed during this study that in most cases the foreign investors with interests in U.S. real estate have no reason to avoid disclosing beneficial ownership and could readily comply with such a reporting requirement. However, there are other cases in which the beneficial owner either cannot or will not be provided. Examples of these situations are:

- Instances where the ownership form (e.g., bearer stock) prevents a company from knowing its owner at any given time.

- Cases where the record of stock ownership in a corporation includes a significant number of shares held in a street name (e.g., Merrill, Lynch, Pierce, Fenner & Smith) and actual shareholders are not known to the corporation's management.

- Situations where ownership disclosure would violate a law in the country in which a company is incorporated or has trustees providing stewardship (e.g., Cayman Islands, Switzerland).

- Occasions when the sheer complexity of tracing ownership chains prevents good faith efforts from discovering the identity of beneficial owners (e.g., complex corporate co-ownership and subsidiary arrangements, instances where an estate belongs to heirs of unknown name, number, and address).

In other cases, foreign investor intermediaries (e.g., bankers, brokers, lawyers) have testifed that anonymity is important to foreign investors because of home country restrictions on the exportation of capital or the fear of seizure, expropriation, or reprisals on the part of the home country.14/ Individuals in this case may go to great lengths and risk substantial penalties to avoid disclosure.

Reporting of beneficial ownership therefore presents many practical difficulties. Government agencies, for example the SEC, have acknowledged the above problems and indicated that enforcement on a selective basis is the only practical approach. The negative compliance aspects of beneficial ownership reporting have a more serious consequence vis-a-vis the feasibility of the system if the identify of the foreign owner is crucial.

Issue	Potential Solutions
o Reporting of beneficial ownership	If the objective of the system is to identify specific parcels of land (and the characteristics and use of parcels), disclosure of beneficial owners is necessary. Consideration should be given, however, to the compliance and enforcement tradeoffs.

14/ Hearings Before the Consumer, Commerce and Monetary Affairs Subcommittee of the House of Representatives' Committee on Government Operations, Statement of John L. Gornall, Jr.; Powell, Goldstein, Frazer & Murphy.

Issue 2: Reporting of Real Estate Types

By "type" of real estate, we are referring to general categories such as: a) residential, commercial, industrial, agricultural, etc., or b) income-producing versus nonincome-producing land. This definition is separate from the question of use, which is another means of classifying property.

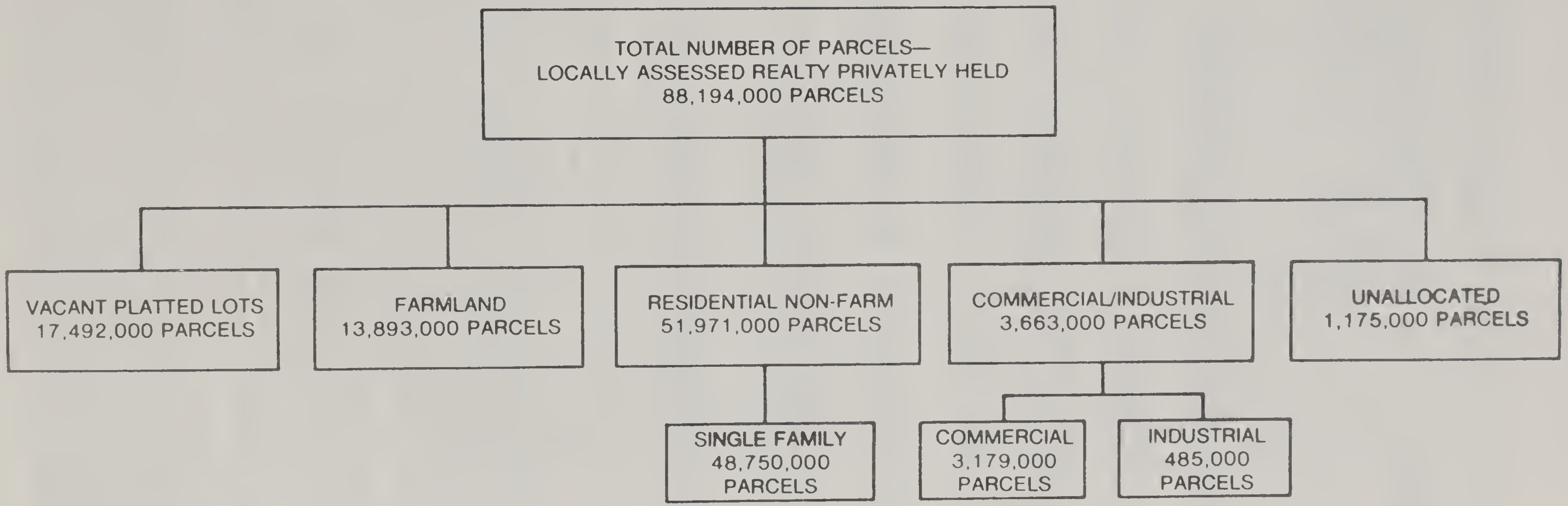
One method of establishing types of property to be reported would be to include only commercial, industrial, and agricultural (farm and forest) land, thereby excluding residential property, which accounts for an estimated 49 million individual pieces of land (including all owners, domestic and foreign). Residential land has an average value much less than commercial property. Exhibit II-4 shows the number of real estate parcels associated with these types of properties. The exemption of residential parcels would avoid the costs to both the Government and the reporters resulting from filing forms on relatively small amounts of property used by nonresident aliens. For example, Canadian citizens are known to own many condominium units and resort properties in Florida which they use for their personal vacation and partial retirement living purposes.

An "income" test also could be applied to commercial as well as residential properties. For example, all real estate interests which are used for the production of gross revenues exceeding an established annual dollar amount by the beneficial owner/controller could be exempted from reporting. This could potentially result in exempting the vacation condominium and similar residential properties mentioned above from reporting as well as avoiding the reporting of trivial or dormant mineral, water, air, or other property-right interests. It would not, however, exclude significant income-producing residential and other property-type owners--such as owners of apartment buildings--from reporting.

Issue	Potential Solutions
o Reporting of real estate types	o A potentially feasible solution would require the reporting of nonresidential land and residential properties if they are used for the production of over $1,000 (or some other amount) in gross annual revenues. The establishment of a low dollar threshold for reporting residential and/or commercial parcels has trade-offs with respect to the costs to the reporter and the Government.
	o In the case of partial leases/subleases, some reasonable boundaries could be set taking into consideration such factors as the short-term

EXHIBIT II-4

PARCELS OF LAND



Source: U.S. Census of Governments
1977

Issue	Potential Solutions
o <u>Reporting of real estate types</u> (Cont.)	vs. long-term duration of a lease, the size or type of a small partial lease (e.g., for office space), and the dollar value of the partial lease.

<u>Issue 3</u>: Methods Used to Determine the Value or Worth of Existing Holdings

There are many ways of estimating the value of real estate. Among these alternatives for a reporting system are:

- the <u>purchase price</u> or other consideration paid at the time the real estate interest was acquired;
- asking the foreign investor to <u>estimate</u> current <u>fair market value</u>;
- asking for the <u>book value</u> of the property owned by corporations; and
- asking for the <u>value assessed for property tax purposes</u>, adjusted for partial valuation practices.

<u>No one method will provide a consistently accurate measure of the value of existing holdings, as indicated by the reasons below</u>:

- <u>Purchase price</u>--While this is the starting point for measurement of real estate worth, its relevance is subject to great deterioration with time. Factors such as the level of maintenance devoted to a property, changes in its surrounding economic environment, inflation, and other conditions all can affect the value of a property and make its purchase price be of little relationship to its current worth. (The AFIDA uses the purchase price adjusted for annual inflation).

  A further complicating factor is the usual inclusion of depreciable assets in the purchase price paid. Thus, even in the simple case of the acquisition of a small farm, the purchase price often reflects the extent to which equipment, livestock, and unharvested crops were included in the transaction.

- Requesting foreign investors to <u>estimate</u> the <u>fair market value</u> of his own real estate could, in some cases, yield excellent results. But there are many reasons why both individuals and companies either cannot or will not provide an accurate estimate. For example, a given piece of property may contain some specialized manufacturing facilities or

characteristics for which there are only a few buyers. The "value" of such property is subject to wide fluctuation, depending upon whether or not a buyer interested in this specialty can be found. There also are many individuals and companies that do not wish to disclose the current worth of the real estate they hold, for example, to avoid property tax reassessments. Other companies have large amounts of land for timber production or other purposes directly related to the products they make and have no good idea as to what individual parcels are worth--in fact, such parcels may have two drastically different current market "values"--one if sold separately and another if combined with neighboring properties.

- Reporting the book value of properties would be of some benefit to companies since it is a readily available figure and also has the advantage of separating the value of the land from the plant and equipment (i.e., depreciable items) on the land. However, the book values often are substantially lower than the current fair market value of the land, especially in the past several years of rising real estate prices.

- The assessed value method has the advantage of being a figure which represents local conditions and changes to adjust to new conditions often on a yearly basis. A significant drawback to requiring reporters to list this amount as the current value of their property, however, is the common practice of deliberate partial (e.g., one-half) valuation of property by local taxing authorities. This practice may not be known or understood by nonresident aliens and could result in their supplying an unadjusted number as the assessor's fair market value estimate. If this method of reporting valuation were used, the agency receiving the data could adjust the amount reported.

  Further difficulties with utilizing the locally assessed value of property are a) the practice by some communities of permitting favorable assessments on commercial property to attract business and b) sometimes substantial deviations between legally established assessments and actual assessed values. There are many cases where actual assessments have been far below fair market value, even though the law calls for 100 percent valuation, because the community either cannot or will not raise the assessments up to fair market value.

Issue	Potential Solutions
Methods used to determine the value or worth of existing holdings	The most reasonable solutions to this issue are to request the purchase price, perhaps adjusted for inflation, or the assessed value, adjusted in cases of partial valuation. These two approaches also could be combined through use of

Issue	Potential Solutions
Methods used to determine the value or worth of existing holdings (Cont.)	purchase price for recent purchases (e.g., past 5 years) and assessed value for prior period purchases.

c. Technical Issue: When are Reports Required?

Issue 1: Freqency of Reporting

There are two factors which are primary determinants of the extent of reporting frequency:

1) How can the integrity of the data base be maintained over time?

2) Is information on new acquisitions by foreigners needed on an on-going (per transaction) versus periodic basis?

- One-time, periodic or annual reporting: The most effective way of assuring that a reporting system has the most complete and accurate information would be to require submission of all holdings annually, such as is done in Iowa for farmland. This is a high-cost alternative, however. A one-time reporting of existing holdings is a less costly alternative, but suffers from obsolescence as time passes.

  A compromise approach would be to require a periodic (e.g., 5-year) comprehensive survey of all holdings.

- On-going reporting or annual updates of new transactions: There are several considerations regarding requiring reports of new acquisitions by foreign investors. The desirability of on-going reports should be related to the overall objectives of the reporting system and should only be implemented if so justified. The considerations are:

  - Some business ventures are very sensitive to disclosures about property acquisitions within a short period after acquisition. This is particularly true for developers or firms interested in large blocks of land in a small area (known as "assembling" land), e.g., for creation of a shopping center or large industrial site. Disclosure that the same entity was attempting to assemble land in an area while the purchases were not yet complete would tend to make remaining landholders seek much higher prices than might ordinarily be the case.

  - Unless some action to limit foreign investments is contemplated, individual reporting of these transactions

versus annual updating of new transactions is as expensive to both the private and public sectors.

- On the other hand, without on-going reporting, local governments and citizens in a given area may not be made aware of substantial acquisitions occurring in the area until well after the acquisitions occurred.

Issues	Potential Solution
o <u>Periodic-annual reporting</u>	o Require periodic (e.g., 5-year) comprehensive reports of all holdings in addition to at least annual reports of new transfers.
o <u>On-going reporting.</u>	o Require annual transaction summaries only, unless the first comprehensive survey identifies significant concentrations of purchases or other reasons for submitting transaction data on a more frequent basis. An alternative would be to require on-going reporting (e.g., reporting within 15 days of a transaction) immediately upon implementation of the reporting system. An evaluation could then be made of the data collected and subsequent decisions made as to whether the on-going reporting is required. AFIDA has instituted this approach.

d. <u>Administrative Issues: Where is Information Submitted?</u>

<u>Issue 1</u>: Governmental Unit Responsibilities for Overall System Operation

There are two major organizational approaches to the assignment of system responsibilities:

- o Create a new unit within an existing agency to implement a reporting system.
- o Place the responsibility in (a) one of the several agencies already collecting foreign investment information (i.e., the BEA or OFIUS, Department of Commerce; the ASCS/ESCS, Department of Agriculture; or Department of Treasury, Office of the Secretary, or Internal Revenue Service); or (b) an agency

which has a substantial data collection and processing responsibility (e.g., Bureau of the Census, Department of Commerce).

Because there are several agencies already involved in collecting foreign investment information, it would appear to be advantageous to utilize one of these agencies rather than to create a new entity. This would avoid the normal start-up problems associated with a new unit and allow the experience gained by the existing organization to be used. In terms of start-up problems, there are many aspects to form design alone which require considerable skill in order to achieve a concise, understandable set of questions that avoid confusion on the part of the reporter and yet satisfy the informational goals of the system.

Issue	Potential Solution
o Governmental Unit Responsibilities	o Place responsibility in a Federal agency already collecting foreign investment information.

Issue 2: Organizational Responsibility for Form Distribution, Data Collection, Verification and Analysis

This issue addresses the organizational approaches available for structuring forms development and dissemination, data collection, verification and analysis of the data:

- Forms development and dissemination: The two major options available include: (1) centralized form dissemination from a single headquaters unit; and (2) de-centralized form dissemination through regional, area, or field offices.

  The BEA uses the centralized approach. The BEA's Washington D.C. office develops and distributes foreign investment reporting forms, checking with probable foreign investors and professional organizations whose members service the foreign investment community to maximize the completeness of the surveys. The USDA (AFIDA), on the other hand, distributes reporting instruments on foreign investment in agricultural land utilizing field offices. The AFIDA system is able to rely on offices in close contact with many owners of the real estate that is the subject of the reporting system. Few other types of real estate (particularly urban) have corresponding local Federal agency offices in close touch with the owners (exceptions could be mining or other industrial property with substantial Federal regulatory ties).

  The IRS and the U.S. Postal Service are examples of agencies, field offices that also could be used for form dissemination,

but it is not feasible to rely on these entities to collect and verify data.

- o Data collection, verification and analysis: There may be cost advantages to allocating the form collection and verification workload over a large number of local offices. This could minimize the need for additional staff at a centralized location and improve data verification. The use of Federal regional offices probably would not result in such staff economies and is it likely that regional personnel will know significantly more about foreign investors in their multi-state region compared with a single headquarters staff.

  On the other hand, the disadvantages associated with the decentralization of data collection or verification include (1) lack of uniformity in responding to inquiries and in performing basic verification work on the part of the field offices, and (2) difficulties in keeping large numbers of field units abreast with policy and procedural changes. Given these factors, it generally is preferable to concentrate the responsibility for operation of the reporting system within a single organizational unit to avoid coordination problems. The unit would then be provided with the proper sensitivity to data weaknesses uncovered in the data collection and verification process. In some instances (e.g., AFIDA) it may be desirable to organizationally split data collection from data analysis. However, such instances should be avoided if possible.

Issue	Potential Solution
o Forms development and dissemination	o Place responsibility in a centralized office unless the system is limited to reports which focus on a particular real estate use or type with close Federal agency ties (e.g., mining or agriculture).
o Data collection and verification	o Centralize all responsibilities in a single entity.

e. Legal Issue: What Are the Legislative or Regulatory Changes Needed to Implement a Direct Registration System?

Issue 1: Required Legislation and Rulemaking Authority

The major legal issue to be considered with regard to Scenario I is the existence of sufficient legislative and rulemaking authority to mandate a Federal comprehensive foreign investment registration system. As has been mentioned, several Federal agencies and departments are engaged in

information gathering efforts with respect to investment in the United States and the activities of nonresident aliens. However, the authorizing legislation and the attendant constraints for these collection efforts do not appear to be appropriate for the development of such a comprehensive registration system.

Issue	Potential Solution
o Required legislative and rulemaking authority	o Draft legislation which authorizes the establishment of a comprehensive system to meet specfic objectives (e.g., to determine the magnitude of foreign investment in all U.S. real estate and the number, ownership, characteristics, and use of individual parcels).

C. Feasibility of Scenario I

1. Overall Project Criteria Summary

Exhibit II-5 presents a summary of the general performance of a direct registration system compared with to the project's technical, administrative, economic, and legal criteria. A more detailed discussion of the extent to which this scenario could achieve the overall objectives of a monitoring system then follows in Exhibit II-6. Neither of these feasibility assessments analyzes a specific system; however, many alternatives have been examined, drawn from the detailed issue discussions presented above.

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO I

PROJECT CRITERIA	FEASIBILITY SUMMARY
1. Technical Factors	From a technical viewpoint, there are many feasible alternative approaches to the design of a monitoring system. These alternatives should be evaluated based on a clearly stated set of system objectives, which should determine the requirements for particular types of data, frequency of reporting, and analyses to be conducted. It is generally feasible to design a system to monitor overall foreign investment magnitudes or individual transactions (purchases or sales); however, it is difficult to design a system which will permit economic analyses involving the impact of foreign investment on the general economy or particular areas. Such a system would have to include data on <u>all</u> real estate investment, domestic and foreign. It is feasible to capture most of the potential data elements on owner and real estate characteristics. Two important exceptions are: 1) beneficial ownership information, which in somes cases either cannot or will not be able to be collected; and 2) accurate estimates of current real estate values.
2. Administrative Characteristics	Highest efficiency and effectiveness appears to be attainable from using a single agency already involved in analyses of foreign investment issues to implement the system. Verification of the accuracy of forms submitted and compliance with reporting requirements would be difficult and expensive due to lack of cross references and labor-intensive nature of assuring compliance.
3. Economic Costs	Precise costs would be determined by the specific reporting requirements established. Based on volume estimates presently attainable, this could range between $4 to $8 million to the Government annually for reporting

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO I (cont.)

PROJECT CRITERIA	FEASIBILITY SUMMARY
3. Economic Costs (Continued)	of new transactions, with an additional $1.5 million cost incurred for comprehensive surveys of existing holdings.6/ Foreign investor costs would vary with the number of holdings and transactions of each investor. Compliance costs could be high for investors with numerous holdings.
4. Legal	Legislation specifically authorizing direct registration requirements likely would be needed to establish a system.

6/ These estimates are based on the methodology discussed in Appendix 2 and exclude agricultural land (already covered by AFIDA) and non income producing land. There also was no allowance made for the economic impact of requiring reporting from foreign-owned fiduciaries (e.g., banks). The extent of real estate controlled but not beneficially owned by these fiduciaries is unknown.

DIRECT FEDERAL REGISTRATION SYSTEM
FEASIBILITY ASSESSMENT SUMMARY

I. TECHNICAL DATA ASPECTS	ASSESSMENT OF FEASIBILITY
A. Who is Required to Report?	
1) Owners of these types of real estate for which reports are required:	
- Agricultural land	Easiest type of land to identify owners, obtain valuation and other data.
- Commercial	Attainable, but has a large component of partial leases/ sub-leases (e.g., office space) and is a rapidly changing picture difficult to analyze.
- Industrial	Most attainable of urban land types. Industrial land parcels have low turn-overs and usually are relatively large and identifiable.
- Residential	Least feasible in terms of reporter and Government agency data collection costs. Many interests (e.g., condominium units) are relatively small.
2) Owners of these types or forms of interest to report:	(See above issue discussion.)
a) Of entire property:	
- Title ownership	Attainable in most cases.
- Leases/subleases	Attainable but difficult to verify compliance. Suggest minimum of 10-year lease for reporting threshold, make fee title ownerhip and leases mutually exclusive.
b) Partial interests:	
- Mineral, water, surface, other use rights	Attainable, sometimes difficult to verify compliance. Use of rights can be dormant, and can result in multiple reporting or reporting of trivial information.
- Stock, limited partnerships	Attainable with significant limitations (e.g., stock listed in street names). Requiring reporting of passive forms of investment (e.g., preferred stock and certain limited partnerships) can result in reporting of noncontrolling interests.
- Land contracts, other future interests	Attainable but difficult to verify compliance due to absence of public records.

I. TECHNICAL DATA ASPECTS	ASSESSMENT OF FEASIBILITY
3) Trusts, other nonbeneficial ownership forms of control	Attainable but potentially burdensome to reporter.
4) Sellers as well as buyers	Sales data necessary to calculate net increases or decreases in foreign investor interests. Less attainable than acquisition data due to absence of an enforceable penalty.
5) Reporting requirements for intermediaries.	Attainable and desirable from a data verification viewpoint. Annual submissions would not be costly.
6) Percentage of foreign interest triggeing reporting selection of level.)	Can set levels ranging from 5 percent to more than 20 percent. (See above Issue discussion)
B) What Data are Reported?	
1) Beneficial ownership reporting	Attainable for most owners. Can be very time consuming for long, complex ownership chains. Sometimes unattainable (see above issue discussion), as in the cases of bearer stock or incorporation in countries with laws against disclosure of this information (e.g., Switzerland).
2) Other ownership information:	
- Name, address, nationality or principal place of business.	No problems in most cases. Would be difficult for some corporations to provide the names of its owners.
- Type of owner (e.g., individual, corporation, trust).	Attainable.
3) Real estate data:	
- Value of land	Not easily measurable for existing holdings. Use of assessed value a potentially useful means of valuing existing holdings. (See above issue discussion).
- Size and location	Attainable.
- Use of land	Broad categories easily attainable. More detailed data (e.g., on employment, specific business, etc.) less attainable, adds complexity, somewhat duplicative of present BEA and Census efforts.
- Purpose of purchase or acquisitions of other interest	Same as in "Use of land" above.
- When, how purchased	Attainable.

II. ADMINISTRATIVE CHARACTERISTICS	ASSESSMENT OF FEASIBILITY
C. When are Reports Required?	
1) Frequency of report submission for existing holdings:	
- Annual comprehensive reports	Most accurate but costliest method of monitoring.
- Periodic surveys (e.g., every 5 years)	Provides updates on land use and value and is less costly than annual reports.
- One-time survey	Is the least-cost alternative and may be all that is needed if results prove that actual extent of foreign ownership is small. However, value of data collected deteriorates with time even if supplemented by information on new transactions due to use and value shifts (two primary data elements).
2) Timing of current transactions reporting	
- Submission of an annual list	Lowest cost to reporter and Government. Fails to satisfy potential objective of alerting Government, local communities, or public to new acquisitions on a timely basis.
- Reporting required within short time after acquisition or sale of interest	Represents a potential burden to foreign-owned real estate developers and others attempting to "assemble" land (e.g., for a new manufacturing site) by alerting sellers (landowners) to this effort and probably causing price inflation. May be difficult to enforce.
A. Where and How are Reports Submitted?	
1) Type of forms used:	
- Postcard form	Not feasible if number of data elements desired exceeds about 20.
- Separate form for each parcel	Attainable. Some advantages (e.g., to send copies to local governments) but has higher reporter costs.
- Single form for each foreign investor with attachments for multiple parcels	Attainable. Minimizes reporter cost
- Separate form for intermediaries	Desirable and attainable.
- Separate forms for different use or type of real estate	Attainable. Has mixed implications. Would produce more and better data but cause distribution problems and reporter confusion.

II. ADMINISTRATIVE CHARACTERISTICS	ASSESSMENT OF FEASIBILITY
2) Methods of data collection:	
- To local field offices	Attainable but not desirable except if specialized forms or reporting requirements were devised for certain real estate types or uses (e.g., mining or agriculture). Difficult in cases of urban real estate.
- To regional (10) offices	Attainable but not advantageous.
- Centralized	Attainable and likely to be the most efficient method for a system encompassing both urban and rural real estate.
B. How is Data Compiled, Verified, and Analyzed?	
1) Government unit responsibility	(See issue section above for discussion).
- Separation of forms preparation and collection duties from analytical ones	Feasible. Some advantages if corresponding organizational strengths also are separated. But also creates coordination problems, lack of sensitivity to data weaknesses.
- Implementation responsibility:	
a) To an existing unit	Feasible and desirable. Several agencies have considerable experience directly relevant (BEA, Census, OFIUS, USDA elements).
b) Create a new unit	Feasible but would have higher start-up costs than if an existing unit were used and somewhat duplicate current efforts.
2) Verification of reports filed, or compliance	
- Form completeness and accuracy checks	Incomplete forms can be returned to foreign investors for additional data. Accuracy checks on current holdings data difficult and expensive.
- Compliance monitoring	Difficult. Most comprehensive source of foreign investor names is the Internal Revenue Service. Very strong barriers to using tax returns for this purpose exist, however. Other methods such as search of county records, other Federal agencies, etc., very time consuming, expensive, and inadequate for cross-checking purposes.
3) Types of analysis and reporting performed	Dependent upon objectives and data elements reported in Section I.B. above.

III. ECONOMIC CHARACTERISTICS	ASSESSMENT OF FEASIBILITY
A. How much does the system cost?	
1) Direct costs to the Government for form preparation and mailing, data collection and verification, and analyses	o Assuming the volume estimates derived using the methodology in Appendix 2, estimated costs of a survey of existing holdings would be more than $1.5 million, and costs for on-going reports of transactions would be $4 to $8 million.
2) Direct costs to reports	
- To foreign investors	o Some types of foreign investors will incur significant costs for registering existing holdings (e.g., those with businesses that have numerous separate land parcels--gasoline stations, supermarkets, etc.). Identification of certain data elements, such as original purchase price, will be difficult to obtain for long-established firms.
- To intermediaries	o Requirement for submission of a brief report on an annual basis would not be a heavy burden. However, on-going reporting would be a substantially greater problem to intermediaries since some are involved in hundreds of transactions annually.
3) Indirect costs to foreign investors	
- Disclosure of sensitive business information	o Would have an adverse impact in two areas: 1) a business whose competitive position may be harmed if other firms learned of the exact location and extent of its real estate holdings; and (2) foreign investors attempting to "assemble" land for development purposes. In these cases, an annual reporting requirement would have less impact than an on-going requirement.
- Discouraging of investment	o Disclosure of beneficial ownership could discourage those individuals who are citizens of countries with exchange controls, and the disclosure of some sensitive information as described above also could tend to lessen foreign investment.
4) Penalties	o Could be set at a number of levels. Should be based on a percentage of the value of the foreign investor's interest in the real estate.

IV. LEGAL CHARACTERISTICS		ASSESSMENT OF FEASIBILITY
A. What legislation is needed?		
1) Legislative changes required	o	Legislation specifically authorizing a direct registration system would be necessary. There is no existing authority which could feasibly be used for a comprehensive system which disclose the identify of individual landowners or transactions.

III. USE OF CURRENT FEDERAL AGENCY DATA COLLECTION ACTIVITIES TO MONITOR FOREIGN INVESTMENT IN U.S. REAL ESTATE (SCENARIO II)

A. Definition of an Approach Utilizing Current Federal Agency Data Collection Activities

1. Overview of current data collection activities.--This section examines the feasibility of utilizing current Federal agency data sources to monitor foreign investment in U.S. real estate. Potential modifications to these data collection efforts which would enhance the quality and amount of information available also are identified and assessed.

The potential modifications that are evaluated in this section are within the basic purpose and general scope of the current Federal agency activities, in order to maintain a clear separation between this alternative (Scenario II) and the direct Federal registration approach (Scenario I) discussed in the previous section. Unless deliberately limited, modifications to existing surveys and reporting requirements could be proposed which would result in a convergence of this alternative with the direct registration system model.

The following list of departments and agencies contacted to identify relevant existing data sources demonstrates the range of fact-finding which was undertaken in connection with the feasibility study of Scenario II.

- U.S. Department of Agriculture (Agricultural Stabilization and Conservation Service, Forest Service)
- Department of the Treasury (Office of the Assistant Secretary for International Affairs, Internal Revenue Service, Office of Foreign Assets Control)
- Department of Commerce (Bureau of Economic Analysis, Office of Foreign Investment in the United States, Bureau of the Census)

- o Department of the Interior (Bureau of Land Management)
- o Federal Reserve Board (Banking, Supervision and Regulation Division)
- o Department of Energy (Office of International Energy Affairs)
- o Department of Justice (Immigration and Naturalization Service)
- o Department of Housing and Urban Development (Office of Interstate Land Sales)
- o Civil Aeronautics Board (Accounting and Reporting Systems Division)
- o Federal Trade Commission (Bureau of Compensation--Pre-Merger Notification Office)
- o Securities and Exchange Commission (Office of Disclosure Policy and Procedings)
- o General Accounting Office

Based on our review of these Federal agencies, the following organizations were identified as having significant information on foreign investment in U.S. real estate:

- o Department of Commerce
  - Bureau of Economic Analysis
  - Office of Foreign Investment in the United States (OFIUS)
- o Department of Agriculture
  - AFIDA reporting
- o Department of the Interior
  - Bureau of Land Management (BLM)
- o Department of Treasury
  - Internal Revenue Service (IRS)

A summary of the information which is currently collected by these agencies is presented in Exhibit III-1. This summary is arrayed by type of real estate.

EXHIBIT III-1

FEDERAL AGENCY DATA COLLECTION ACTIVITIES REGARDING FOREIGN INVESTMENT IN U.S. REAL ESTATE

Type of Real Estate	Department of Commerce: Bureau of Economic Analysis	Department of Commerce: OFIUS	Department of Commerce: Census Bureau	Department of Agriculture	Department of Interior (BLM)	Department of Treasury (IRS)
I. RURAL						
o Farmland	Aggregate data collected and reported annually for firms with investments totaling 200 acres or $5 million in assets, sales, or losses. No transactions data.	Occasional large acquisitions identified by specific parcel and owner. No existing holdings data or data on sales.	Aggregate information reported on size, value and use of foreign owned farmland.	Comprehensive data collected on individual holdings and transactions of foreign investors.	- - -	Only aggregate data available. Location and value data collected for property sold for capital gains or loss. Current holdings data only of book value of land (not improvements) owned by corporations. Only farmland identified by use, type and size.
o Timber/ Forest Land	Same as for farmland.	Same as for farmland.	- - -	Same as for farmland.	- - -	Same as for farmland.
o Federal Land	- - -	- - -	- - -	- - -	Lease applications for use of Federal land under BLM stewardship have beneficial owner identification.	- - -
o Other Rural	Same as for farmland.	Same as for farmland.	- - -	- - -	- - -	Same as for farmland.
II. URBAN						
o Commercial	Same as for farmland.	New acquisition data available on specific parcels and owners, as derived from public sources.	- - -	- - -	- - -	Same as for farmland.
o Industrial	Same as for farmland.	Same as for commercial property.	- - -	- - -	- - -	Same as for farmland.
o Residential	Same as for farmland.	- - -	- - -	- - -	- - -	Same as for farmland.
o Other Urban	Same as for farmland.	Same as for commercial property.	- - -	- - -	- - -	Same as for farmland.

2. Discussion of current Federal agency data collection activities.--The following is an overview of the types of real estate data currently being collected by Federal agencies, expressed in terms of type of land, i.e., rural or urban. Other more detailed descriptions of the present data are presented in Exhibit III-2 which appears at the end of this sub-section, and in the report-by-report discussion which follows (See section on Information Provided by Major Foreign Investor Data).

a. Data currently collected on rural real estate

With the establishment of USDA's reporting requirements under AFIDA, there is now extensive information collected on foreign investment in agricultural land. The information required under AFIDA includes a one-time reporting of all agricultural land held by foreign investors and submission of a report for each transaction undertaken within 90 days of its occurrence. The data reported includes the purchase price, size, use, beneficial ownership, and other related information. The "agricultural land" reported under AFIDA includes both farmland and forest land.

Other information collected on foreign investment in rural property includes the BEA surveys of larger foreign owned companies, which is reported on an aggregate basis. Information is included on mineral rights and title ownership; and the total value of the "land" and "plant and equipment" is reported. In addition to this information, the Census Bureau conducts a periodic Census of Agriculture which produces extensive farm use aggregate data, including characteristics of farms owned by noncitizens.

Data on an extensive amount of Federal land, which is almost exclusively rural, is maintained at the field office level by BLM. This information concerns leasing of Federal land and has extensive use and beneficial interest information.

b. Data currently collected on urban land

There are now two primary sources of data on urban land: the OFIUS, which collects and reports on data derived from public sources on foreign investment, and the BEA reports referred to above.

The OFIUS data identifies specific locations, uses, purchase prices and beneficial owners of urban property acquired by foreign investors. These properties are mainly hotels, apartment buildings, and other commercial real estate. No data are collected on private residences, small acquisitions or current holdings.

The BEA data are made available only in aggregate form, as for rural real estate. No information is collected for on-going transactions.

3. <u>Potential improvements to existing data collection activities to achieve a model system</u>.--The following provides an overview of the potential changes to the existing Federal data collection and reporting requirements which are detailed in Exhibit III-2 and analyzed on the basis of the project criteria later in this section.

a. <u>Technical data requirements</u>

Several steps could be taken which would improve the quality and amount of data on foreign investment in U.S. real estate available from existing sources. Exhibit III-2 specifies some of the potential changes which could be made to the various existing reporting requirements. These potential changes involve:

- o Modifying the reporting thresholds so as to increase the reporting of foreign investors with significant real estate holdings;
- o Refining the requirements for reporting selected data elements pertaining to real estate; and
- o Preparing summaries of data which are now reported but are not made available.

In addition to these steps, more extensive use could be made of the current authority and capability of the BEA to conduct special surveys and analyses of particular areas of interest. These areas might be tied to policy questions arising as time progressed, such as ownership of certain natural resources, or to areas which the data being collected provided inadequate information or indication of unusual trends.

The form in which the BEA currently <u>reports</u> the foreign investor data it collects could also be changed so that the identity of individual foreign investors and their aggregate real estate holdings are revealed. This would result in data on the total size (in terms of acres) and value (book value) of the existing real estate holdings of 7,200 individual firms reporting in the periodic surveys being revealed. As discussed later, however, the feasibility of implementing this change is limited by: a) the necessity of amending the restrictions in the International Investment Survey Act, which explicitly prevent the disclosure of BEA data on individual reporters, and b) the historic opposition of the BEA to this change, since they believe that such disclosure would lessen the amount of cooperation and compliance by foreign investors with their survey efforts.

A further action which could be taken that would improve the completeness of the data presently being collected would be to increase the monitoring of reports already being required by other Federal regulatory agencies such as the Federal Reserve Board and the Securities and Exchange Commission. These and other agencies are expanding and

EXHIBIT III-2

MAJOR REAL ESTATE DATA COLLECTION AND DISSEMINATION EFFORTS

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
1. Bureau of Economic Analysis		
o 1977 survey of inward investment (BE-15)		
Reporters:	Data Now Collected:	
- U.S. affiliates with 10% or more direct foreign ownership of voting securities and more than $5 million in total assets, net sales or losses,	- Number of acres of land and mineral rights leased and owned.	- Replace 200-acre threshold with a real estate value threshold, e.g., $500,000 book value (rule-making needed).
	- Gross value of property and of plant and equipment.	- Separate mineral rights from title ownership on reporting form (the BEA is now planning to do this).
OR		
- Those that hold 200 or more acres of land.	- Data are reported by each investor in aggregate form, by-State	
- Banks are excluded.		
	Data Now Reported:	
	- Data collected are released in aggregate form, in investor categories such as nationality, type of business, land owned by State, etc.	- Specify real estate owned by each foreign investor in public reports issued (legislation needed).
o Survey of establishment of or investment in a U.S. business enterprise (BE-13/14)		
Reporters:	Data Now Collected:	
- Newly acquired or established U.S. affiliates (including real estate) with 10% or more voting securities interest owned by a foreign entity; one-time only report (i.e., at time of change).	- Total number of acres of land leased and mineral rights owned or leased, by primary use.	- Request greater detail regarding purpose of acquisition, expected changes in use of land. (rule-making required)
		- Request data on value of real estate transferred.

EXHIBIT III-2
(continued)

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
	Data Now Reported:	
	- No reports yet (is a new requirement). Expect to release data collected above in aggregate form as in BE-15 survey above.	- Release information on real estate acquired by each reporter (legislation needed).
o 5-year comprehensive surveys of inward and outward direct investment (BE-12)		
Reporters:	Data Now Collected:	
- Firms with 10% or greater foreign interest in voting securities, and assets or revenues of $500,000 or more.	- Total value of land held for resale, total gross cost and depletion of property acquired.	- Identify land values by State.
	- Number of acres of land owned or leased in each State if total amount is 200 or more acres.	- Replace 200 acre threshold with a dollar level, e.g. if book value of land exceeds $500,000 (rule-making needed).
	Data Now Reported:	
	- Aggregate data issued by industry classification, nationality, etc.	- Release information on real estate acquired by each reporter (legislation needed).

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
2. U.S. Department of Agriculture		
o Reporting under the AFIDA (Form 153)		
Reporters:	Data Now Collected:	
- Foreign investors with a 5% or more interest (other than a debt interest) in agricultural land.	- One-time report on existing holdings from all owners on a parcel-by-parcel basis.	- The effort has been designed as a comprehensive system. Since it has only recently been initiated and significant data has not yet been collected or reported, modifications have not been presented. However, some of the "potential solutions" to the issues raised in the section describing Scenario I could be used to advantage.
	- One-time report of every new transfer. Data are required on value, use, size, etc. of land and beneficial ownership.	
	Data Now Reported:	
	- All data received are made public within 10 days after submission.	

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
3. Internal Revenue Service		
o U.S. income tax of a foreign corporation (Form 1120F)		
Reporters:	Data Now Collected:	
- Foreign corporations with income from U.S. sources and/or engaged in a trade or business in the United States during taxable year.	- Corporations with "effectively connected" U.S. income identify total book value of land they hold connected with the U.S. trade or business.	- Require separation of value of U.S. land from land in other countries.
	- Firms with income from exchange or sale of property or from rents or royalties from natural resources identify location of property, improvements made, beneficial ownership.	
	- Size, location, dates and prices of purchase and sale of property on which a capital gain or loss was realized.	
	Data Now Reported:	
	- Aggregate data on number of firms filing returns and certain deductions made, but no real estate data released.	- Summarize data now collected and new data on "land" suggested above.
o U.S. corporation income tax return (Form 1120)		
Reporters:	Data Now Collected:	
- All Domestic corporations (except for life and mutual insurance companies, exempt farmers, cooperatives, and small business corporations).	- Book value of "land" owned (not including improvements).	- Require separation of "land" into U.S. and foreign land.
- Firms with 50% or more foreign ownership separately identify themselves.	- Indication of whether or not a foreign person owned 50% or more of the voting stock of the corporation filing and, if so, that owner's country (or if an individual, that person's name and address).	- Lower percentage for indicating foreign ownership to 10% to be consistent with BEA data.
	- Size, location, purchase, and sale dates and prices of land on which capital gain or loss was realized.	

EXHIBIT III-2
(continued)

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
	- Name, address, nationality and percent of equity interest of foreign entities reported if they have a 50% or more equity interest.	
	Data Now Reported:	
	- Total number of firms with 50% or more foreign ownership, by eight industrial categories.	- Summarize data now collected and data on "land" suggested above.
o U.S. nonresident alien income tax return (Form 1040 NR)		
Reporters:	Data Now Collected:	
- Individuals who are non-resident aliens (did not live in the United States for 183 or more days of taxable year) with income earned for personal services in the United States	- Number of acres and location of farmland.	- Ask foreign investors to indicate whether they acquired any real estate during taxable year and if so what was purchase price.
	- Value and location of property sold for a capital gain or loss.	
	- Size, location, purchase and sale date and price of land on which capital gain or loss was realized.	
	Data Now Reported:	
	- No public reporting now done.	- Summarize data now collected by nationality, State in which property owned was sold, average sales price, etc.
o Estate of a nonresident not a U.S. citizen (Form 706NA)		
Reporters:	Data Now Collected:	
- Required for estates of nonresidents who were not citizens and had a gross estate situated in the United States which exceeded $30,000 at date of death.	- Itemization of all real estate owned by the decedent by location and value.	- Project size and value of current holdings of nonresident aliens by using estate tax data (i.e. assume that decedents comprise a fixed percent of total nonresident alien holdings).

EXHIBIT III-2
(continued)

SOURCE OF DATA/REPORTERS	DESCRIPTION OF REAL ESTATE DATA NOW COLLECTED AND RELEASED	POSSIBLE ACTIONS TO IMPROVE FOREIGN INVESTMENT IN REAL ESTATE DATA
	Data Now Reported:	
	- No public reporting now done.	- Summarize data now collected to use in extrapolations mentioned above.
4. Office of Foreign Investment in the U.S.		
Reporters:	Data Now Collected:	
- No reporting requirement. Utilize newspaper clipping service information and data gathered from other public sources (e.g., Dun and Bradstreet credit data, etc.).	- When publicly available, total value of purchases, name and country of purchaser, type of business and/or real estate acquired. No information gathered on acquisitions of private residences.	- Expand coverage to include all legally available data on investments identified by U.S. Government agencies, States, etc., regardless of whether or not publicly available.
	Data Now Reported:	
	- Annual reports issued on the value, location, and use of new real estate acquisitions and identity of foreign owners, when available.	

improving the quality of data they collect on foreign ownership of the industries they regulate (not specifically the real estate owned). Monitoring of this information would ensure compliance with existing reporting requirements (such as BEA surveys) and sharpen the analytical capabilities of a real estate monitoring staff.

Even if all of the above steps were taken, the resulting information still would not provide information concerning several aspects of foreign investment in U.S. real estate, such as specific parcel ownership or transaction data. The characteristics and limitations of the improved information are discussed in the next section.

b. Administrative characteristics of the potential system

An intensified monitoring of foreign investment in U.S. real estate would be improved by designation of a single centralized organization to be responsible for foreign investment monitoring. This organization could integrate the data being collected into as complete a picture as possible of the location, size, and areas in which the investments have been and are being made. The responsibility for performing this function should logically be placed in one of the Federal offices already performing analyses on foreign investment issues, such as the BEA or the OFIUS. This would place a single agency (or office) in charge of both assuring that the improvements in existing data collection efforts were implemented by the other agencies and of performing the analysis of the information which resulted.

B. Feasibility of Scenario II

1. Overall Technical, administrative, economic and legal criteria summary.--Exhibit III-3 provides a summary of the performance of Scenario II compared with the project's four basic criteria. Essentially, we are evaluating the extent to which current data collection activities of Federal agencies, modified as described, meet specific reporting criteria.

The data on foreign investment presently being collected by Federal agencies are being collected for a variety of purposes. In addition, the data are not analyzed or summarized by any single group or agency. Given this fact, Scenario II is not actually a "system". However, we view it as such for the purpose of analyzing the feasibility of Scenario II since the data could be assembled and utilized by an agency to monitor foreign investment in U.S. real estate.

C. Information Provided by Major Foreign Investor Data

The following section presents more detailed information on: the purpose, reporting entities, general data collected, real estate data, and data characteristics collected by the IRS, BEA, Bureau of Census, BLM and USDA on specific major reporting requirements:

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO II

PROJECT CRITERIA	FEASIBILITY SUMMARY
1. Technical Factors	In general, it is not feasible to utilize current data collection activities to collect all potential data on foreign investors or investments. The technical data collection limitations preclude the ability of Scenario II to meet all potential system objectives. Only the U.S. Department of Agriculture's AFIDA represents such a comprehensive approach. Scenario II would enable the collection of data on major investments and the reporting of aggregate investment totals or publicly available transaction data. At the current time nonagricultural real estate data collected generally are limited to major investments. Beneficial ownership identification is limited to the first tier of investment holder. The BEA reports only aggregate data to the public; transactions or identification of investors is statutorily confidential. The OFIUS does collect and report publicly known transactions. It is feasible to expand coverage of current reports by lowering the minimum size of investments reported and increasing analysis reported. If statutory constraints were removed, data would be available on the value, size and use of real estate owned by individual firms but not on individual parcels. Agricultural real estate data are now being collected and reported on an individual parcel and owner basis, for both existing holdings and new transactions under the AFIDA requirements. Because the AFIDA system is just beginning, the completeness of the data, number of reports, and other data aspects are not known.
2. Administrative Characteristics	Data collection must remain within the existing framework of a variety of agencies (IRS, BEA, USDA). The analysis and reporting feasibly could continue on the multi-agency approach or be centralized in one agency. From an effectiveness perspective, there are advantages to the centralized approach.

SUMMARY OF OVERALL FEASIBILITY OF SCENARIO II(Cont.)

PROJECT CRITERIA	FEASIBILITY SUMMARY
3. Economic Costs	Costs presently associated with the collection of foreign investment information cannot be calculated given the number of agencies involved and various purposes for collection of data by those agencies. Added costs to the Government would be incurred if new data elements were collected, an analytical staff was established, and/or special surveys were performed.
4. Legal	Changes in foreign investor reporting thresholds would require Federal rulemaking procedures. Additional information required on IRS forms must be approved by OMB and IRS. Obtaining approval may present difficulties. Removal of BEA confidentiality constraints would require additional legislation.

UNITED STATES DEPARTMENT OF AGRICULTURE

REPORT: Land Ownership Survey

I. PURPOSE OF REPORT--To develop improved information on land ownership, use, and investments to improve agricultural land.

II. REPORTING ENTITIES--A random sample of 56,000 property owners were selected on a nationwide basis. The sample included both urban and rural land, however, it is so constituted as to increase the likelihood of rural land owners being selected in a proportion greater than their actual numbers.

III. GENERAL DATA COLLECTED--A series of information was requested on various ownership characteristics and owner information such as income, age, etc.

IV. REAL ESTATE DATA--

1. Nineteen questions were asked regarding land characteristics. These questions included form of ownership, date of purchase or disposal, market value, types of leases, property rights and easements, location by county, and other information.

2. Nine questions were asked regarding owner characteristics. These questions included: principal occupation, age, sex, race, income, citizenship, and dependence on the property. In the cases where a non-U.S. citizen owned the land, the citizenship of that person was requested.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: This report was a one time survey which was conducted during the summer of 1978.

2. Number Received: Out of 56,000 forms sent, 38,000 forms were received.

3. Identification of Investors: Owner characteristics were requested for only one individual who was the recorded owner of the land. In cases where more than one person owned the property, the person who makes the most decisions about the land was the target of the survey. The form of ownership also was identified--e.g., whether the owner was a corporation, partnership, or other form of owner.

4. Extent of Disclosure: The survey results will be available in aggregate form when the ESCS within USDA completes its analysis.

5. Availability of Data: Except for what is published, no other information will be available. Although the survey was voluntary, the report was conducted on the basis that individual information would not be divulged.

6. Verification and Compliance Penalties: No penalties are associated with the voluntary survey. Some land owners who did not respond were contacted by phone to increase the overall response rate.

BUREAU OF ECONOMIC ANALYSIS

REPORT: Interim Survey of Foreign Direct Investment in the U.S., 1977, Form BE-15

I. PURPOSE OF REPORT--To update major items from the previous comprehensive survey taken in 1974 to provide insight into changes since that time and to begin the accumulation of annual time series data for major items.

II. REPORTING ENTITIES--Reports are required from each U.S. business enterprise in which a foreign person owned or controlled, directly or indirectly, 10 percent or more of the voting securities of a U.S. business enterprise at any time during the year 1977. A U.S. affiliate is not required to file the report if: (a) the firm's total assets, sales, or losses was less than $5 million during the reporting period, and (b) the U.S. affiliate did not own 200 or more acres of U.S. land. In addition, banks are not required to report.

III. GENERAL DATA COLLECTED--An extensive amount of financial and operating data of each foreign owned U.S. affiliate is required. Examples of items asked to be submitted include balance sheet information, income statements, total exports and imports of the affiliate, employment information, and the composition of external financing.

IV. REAL ESTATE DATA--

1. Total number of acres of land used at the end of 1977 for agricultural purposes are reported and divided between acres owned and acres leased.
2. Number of acres of land and mineral rights owned and leased from others on a by-State basis are also reported.
3. The total value of property held (minus plant and equipment assets) on a by-State basis is also reported.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: This form is designed as an annual reporting requirement, however, approval has only been given for the BEA to use this form for calendar 1977.
2. Number Received: Approximately 1,500.
3. Identification of Investors: The name and address of the U.S. affiliate is required. The country and location of the foreign parent of the affiliate also is required to be reported along with the percentage share that the parent has in the voting stock of the affiliate. The name and address of beneficial owners of 10% or more of the affiliate in an ownership chain also is required to be reported.
4. Present Extent of Disclosure: The BEA will publish reports and analyses based upon the data collected by the survey. However, this information will be available only in aggregate form--i.e., identification of individual investors will not be possible. BEA rules regarding individual disclosure are that three or more similarly sized firms must be present in any particular category before the aggregate data will be released.
5. Availability of Data: The International Investment Survey Act of 1976 restricts use of this information to analytical and statistical purposes and states that access to the information shall be available only to officials and employees of agencies designated to perform functions under the Act.
6. Verification and Compliance Penalties: Fines of up to $10,000 and/or 1 year of imprisonment are available for punishment of individuals or entities willfully failing to report information required under the Act.

BUREAU OF ECONOMIC ANALYSIS

REPORT: Questionnaire on Establishment of, or Investment in, a U.S. Business Enterprise (Form BE-13/14)

I. PURPOSE OF REPORT--To provide supplemental information to the BEA current data system of monitoring balance-of-payments information. The BE-13/14 will provide information on investments made by U.S. affiliates of foreign parents in other U.S. companies, instead of simply the current monitoring of investments made by foreign parents directly in U.S. affiliates.

II. REPORTING ENTITIES--Reports are required from U.S. business enterprises for which ten percent or more of the voting interest has been acquired by a foreign entity or for newly established U.S. affiliates of a foreign entity. In addition, agents or other intermediaries involved in the sale of a U.S. business enterprise, including real estate, to a foreign person or to another U.S. person who is a U.S. affiliate of a foreign person must also file. The filing requirements are different for intermediaries and business entities.

III. GENERAL DATA COLLECTED--An extensive amount of financial and operating data of each foreign owned U.S. affiliate is required from the business enterprise. Information requested includes name and address, legal form of organization, identification of the foreign parent, and general business information regarding the nature and size of the business activity being undertaken. Intermediaries are required to provide a summary of the name and nature of the business involved in the transaction, the transaction date, and the value of the transaction.

IV. REAL ESTATE DATA--

1. Business enterprises report the number of acres of land leased from others and mineral rights leased or owned in total.

2. The number of acres of land leased or mineral rights owned or leased by primary use (e.g., farmland, timberland, industrial, other).

3. The amount of unimproved property held for investment or future development, by State.

4. Total number of acres of land owned by State, and by primary use.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: This is a one time report which is due within 45 days after the entity is acquired or established.

2. Number Received: It is estimated that approximately 400 will be received every year.

3. Identification of Investors: The name and address and percent of ownership of each foreign parent holding ten percent or more of a direct interest in the U.S. business enterprise acquired is identified. In this way it is hoped that the ownership "chain" will be identified to the beneficial owner.

4. Present Extent of Disclosure: This is a new reporting requirement as of 1979. The BEA intends to publish reports and analyses based on the data collected by the survey. However, this information will be available in only aggregate form, that is, identification of individual investors will not be possible.

5. Availability of Data: Restricted to aggregate data summaries for statistical uses.

6. Verification and Compliance Penalties: Both criminal and civil penalties exist for willful failure to comply or deliberate submission of false data.

EXHIBIT III-4
(continued)

BUREAU OF ECONOMIC ANALYSIS

REPORT: Survey of Foreign Direct Investment in The United States, 1974 (BE-12--Benchmark Survey)

I. PURPOSE OF REPORT--To obtain a comprehensive survey of foreign ownership in U.S. businesses.

II. REPORTING ENTITIES--Reporting was required for each U.S. business enterprise which was controlled by a foreign person during any part of the year ending December 31, 1974. Reports were not required if total assets or total revenues each were less than $100,000 during that year. "Foreign control" was defined as those companies with a 10% or more foreign beneficial interest. New threshold will be $500,000.

III. GENERAL DATA COLLECTED--The report covered more than 257 data elements which requested information on the economic activities of the reporting companies. An additional 67 items were asked concerning the investment and transactions between the reporter and its foreign parent.

IV. REAL ESTATE DATA--The company's opening and closing balances for calendar 1974 were required for 1) the gross cost of property (land, timber, and mineral rights owned by this reporter), including those leased to others, at historical cost, and 2) accumulated depletion of property (charges against the gross cost of property included in the gross cost of property above). In addition, expenditures for property for the year, in a total sum, were requested. 3) The total acres of land and mineral rights owned at the end of the reporting period, if this total exceeded 200 acres, was requested to be reported by-State. The total acres of land and mineral rights leased from others, if exceeding 200 acres, was separately asked and identified on a by-State basis.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: The reporting requirement is for every 5 years, within 60 days after notice appears in the Federal Register.

2. Number Received: 7,200 reports were received which covered approximately 10,200 U.S. legal entities (consolidated reporting was permitted).

3. Identification of Investors: The investor's name and address, form of organization, names and addresses of all business enterprises consolidated, and ownership expressed in terms of voting stock was requested.

4. Present Extent of Disclosure: The information from the survey was released in the publication *Foreign Direct Investment in the United States*, *Volume II* which was released by the U.S. Department of Commerce in April 1976. All of the information in the report was released in aggregate form only.

5. Availability of Data: Besides what is published, aggregate data could be made available for subcategories providing the individual identities of the reporters were not divulged. The Foreign Investment Study Act of 1974 restricted the use of the information gathered in the Benchmark Survey to statistical uses.

6. Verification and Compliance Penalties: The Act prescribed both criminal and civil penalties for willful failure to comply with the reporting requirements prescribed by it.

CENSUS BUREAU, DEPARTMENT OF COMMERCE

REPORT: 1978 Census of Agriculture

I. PURPOSE OF REPORT--To provide census information on farm ownership and operation.

II. REPORTING ENTITIES--All owners and users of agricultural land included in the survey.

III. GENERAL DATA COLLECTED--Extensive amounts of information are collected on the size and nature of farm operations. Included is information on the types of crops produced, irrigation used, farm operator information, etc.

IV. REAL ESTATE DATA--

1. The number of acres of all land owned or used, regardless of location or actual use for farming purposes (e.g., including house lots, idle land, etc.) is reported in total. Included separately is a figure for all land rented or leased from others, including Federal land, and land used in exchange for services.

2. Land use is reported in terms of cropland (by several different categories), woodland, pastureland, and rangeland, and all other agricultural land, by number of acres in each category.

3. The estimated fair market value of the land and buildings for the acreage reported, divided into the categories of land owned, land rented or leased from others, and land rented or leased to others is estimated by the reporter.

V. DATA CHARACTERISTICS--

1. Frequency and Timing of Reports: This is a periodic census taken every 5 years.

2. Number Received: Approximately 3,600,000.

3. Identification of Investors: The type of organization owning or renting the farm is identified by the categories of individuals, incorporated businesses, and other entities. A separate question is asked regarding whether or not the farm was held under foreign ownership in 1978. If there was foreign ownership, the number of acres owned by noncitizens, foreign corporations, or governments is identified. Amounts owned by nonresident aliens not distinguished from resident aliens.

4. Extent of Disclosure: The information provided in the census is published in the report Census of Agriculture. Only aggregate data is provided in this publication.

5. Availability of Data: No other information is available beyond what is published. The information gathered by the census is not available to others either inside or outside of Government. Census reports are immune from legal process and are maintained on a strictly confidential basis.

6. Verification and Compliance Penalties: Refusal to comply with the reporting requirement is subject to a $500 fine. Willful false answers are subject to a fine of not more than $10,000.

BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

REPORT: Various lease applications for Federal land--grazing rights, mineral rights, geothermal, etc.

I. PURPOSE OF REPORTS--To review applications for eligibility, i.e., availability of land, conformance with State acreage maximums, foreign investor restrictions.

II. REPORTING ENTITIES--All those wishing to lease land which the Bureau of Land Management oversees (448 million acres).

III. GENERAL DATA COLLECTED--In addition to information on intended use, royalties, etc., for the land proposed to be leased, the identity of beneficial owners of the entity to be taking the lease is required. No mineral rights are granted to companies with more than a 10% foreign ownership.

IV. REAL ESTATE DATA--Same as III above. Because of foreign investor prohibition mentioned, few data on foreign investors is available.

V. DATA CHARACTERISTICS--

1. Frequency and Timing of Reports: One-time for each application. Leases are renewable after a given number of years.

2. Number Received: Varies. In 1976, there were over 1,000 land use permits in force.

3. Identification of Investors: Information regarding individual stockholders with 10% or more interest in a potential lessor is required on a beneficial interest basis.

4. Extent of Disclosure: Applications are available for public inspection at the BLM State office responsible for the area under lease.

5. Availability of Data: The BLM publishes an annual report entitled Public Land Statistics which contains data on number of leases, amount of land leased, by-State descriptions, etc.

6. Verification and Compliance: No explicit verification program exists. Information received which is deemed unsatisfactory results in requests for more detailed submissions before leases are granted.

INTERNAL REVENUE SERVICE

REPORT: Estate of Nonresident not a Citizen of the United States (Form 706NA)

I. PURPOSE OF REPORT--To provide information for the reporting and collecting of tax on the estates of nonresident aliens.

II. REPORTING ENTITIES--This form must be filed for the estate of a nonresident who was not a citizen of the United States if the part of his gross estate situated in the United States exceeded a value of $30,000 at the date of death.

III. GENERAL DATA COLLECTED--In addition to the decedent's name, address, citizenship, business or occupation, etc., a complete description of the decedent's possessions at the time of his death is required. Several other questions are also asked regarding the nature of the decedent's possessions and the status of his assets.

IV. REAL ESTATE DATA--

1. The estate must indicate whether or not the decedent possessed real property located in the United States at the time of his death.

2. A complete description of the real property owned by the decedent is required in Schedule A of Form 706NA. Along with each piece of property, a valuation at the time of death expressed in U.S. dollars must be provided.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: This is a one-time report which is required within 9 months after the date of the decedent's death.

2. Number Received: No summarization of the number of forms received has been made in the last 10 years.

3. Identification of Investors: The decedent's name, address, place of birth, citizenship, business or occupation, U.S. address, social security number, and the name and the address of the executor of the estate is listed in the form.

4. Present Extent of Disclosure: No recent publications have been made which summarize the information received from this form. The last such summarization was made in 1969 at the request of the Treasury Department.

5. Availability of Data: Aggregate data can be made available providing the identify of individual taxpayers is not divulged. The Disclosure Act and Tax Reform Act of 1976 prescribe strict limitations on the IRS for disclosing individual information.

6. Verification and Compliance Penalties: The normal penalties for falsification of information provided prevail for this form. Maximum fines of up to $10,000 and/or imprisonment of up to 5 years are the available penalties.

INTERNAL REVENUE SERVICE

REPORT: U.S. Nonresident Alien Income Tax Return, Form 1040NR

I. PURPOSE OF REPORT--Provides information for reporting and collecting income taxes of nonresident aliens.

II. REPORTING ENTITIES--Nonresident aliens having income from U.S. sources and/or who are engaged in a trade or business in the United States during the taxable year.

III. GENERAL DATA COLLECTED--In addition to the usual information required for reporting Form 1040, nonresident aliens are required to submit information on several items such as the country in which they are a permanent resident, details concerning any claim for benefits of a U.S. income tax convention with the foreign country, visa numbers, and other information regarding their alien status.

IV. REAL ESTATE DATA--

1. Agricultural information: Nonresident aliens with farms in the United States are required to list the location of the farms and the number of acres in each farm on Schedule F. In addition to this data, an extensive amount of detail regarding the farming activities (e.g., number of livestock, types of crops, amounts of sales for each commodity and type of live stock, etc.) are required to be recorded on Schedule F.

2. All nonresident aliens realizing gains or losses from the sale or exchange of property must list the type of property, date of the acquisition of the property and the date of sale, the gross sales price, and the net gain or loss realized from the sale or exchange of property that is from sources within the United States and is not "effectively connected" with a U.S. business. Reports on sales or exchanges of property that is "effectively connected" with a U.S. business is reported on Schedule D.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: Annual.

2. Number Received: Approximately 100,000.

3. Identification of Investors: A nonresident alien must report his name, address, present home address, occupation in the U.S., the country in which he was a citizen or national during the taxable year, the country issuing his passport, and other information related to the investor alien status.

4. Present Extent of Disclosure: There is no information presently published specificially addressing nonresident alien individuals.

5. Availability of Data: Aggregate data can be made available providing the identity of individual taxpayers are not divulged. The Disclosure Act and Tax Reform Act of 1976 prescribe strict limitations on the IRS regarding release of individual information.

6. Verification and Compliance Penalties: Investigative agents and subpoena powers can be used to verify selected returns. Maximum fines of up to $10,000 and/or imprisonment of up to 5 years are the penalties available for falsification or failure to comply with filing tax returns.

INTERNAL REVENUE SERVICE

REPORT: U.S. Corporation Income Tax Return, Form 1120

I. PURPOSE OF REPORT--Provides information for the reporting and collection of income taxes of U.S. corporations.

II. REPORTING ENTITIES--Domestic corporations, real estate investment trusts, regulated investment companies, and insurance companies (except life and mutual insurance companies) must file Form 1120 annually. Foreign corporations, exempt farmer cooperatives, small business corporations, political organizations, domestic international sales corporations, and homeowners associations all file individually tailored reports which provide slightly different information from Form 1120.

III. GENERAL DATA COLLECTED--A variety of financial and operating information is required in this form. Separate schedules are required for: cost of goods sold, dividends granted, compensation of officers, bad debts, depreciation, special deductions, tax computation, record of Federal tax deposits, balance sheets, and reconciliation of income per books with income per return. In addition, several other forms and schedules are required on an as needed basis, for example, Form 3468--Computation on Investment Credit.

IV. REAL ESTATE DATA--

1. The schedule requiring submission of balance sheet information has a line item entry of "land." Corporations must report the value of their land assets at the beginning of the taxable year and at the close of the taxable year. This entry, however, is not now subdivided between land held in the United States versus land held abroad. The entry also does not include buildings and other fixed depreciable assets which are located on the land.

2. Outstanding mortgage and real estate loans are reported in the same manner as the "land" assets mentioned above.

3. All gains and losses realized from the sale or exchange of the property, by location and size of the property, are reported on Schedule D--Capital Gains and Losses. Included in this schedule is the date the property was acquired, the date sold, the gross sales price, and the cost of subsequent improvements made to the property after the acquisition.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: Annual, by the 15 day of the third month after the end of a company's fiscal year.

2. Number Received: Approximately 1,800,000 of these forms are received annually. Of this, more than 6,000 indicate that they are owned by a foreign entity.

3. Identification of Investors: If 50 percent or more of the voting stock of a company reporting is owned (directly or indirectly) by a single person or other entity, the name, address, and percent owned by that entity is reported. If the owner of such voting stock a person other than a U.S. person, this is indicated as well as this person's country. U.S. persons are defined as citizens or residents of the United States.

4. Present Extent of Disclosure: At present the data on corporate returns is prepared and presented in aggregate form in the IRS book "Corporation Income Tax Returns." Corporations with ownership by a foreign entity (50% or more) are reported in total and divided by selected industrial classifications (e.g., mining, manufacturing, services).

5. Availability of Data: Besides that which was referred to in item 4 above, aggregate data could be made available, providing that the identify of individual corporations was not divulged. The Disclosure Act and Tax Reform Act of 1976 prescribe strict limitations on the IRS for disclosing individual income tax

6. Verification and Compliance Penalties: Investigative agents and subpoena powers can be used to investigate selected returns. Maximum fines of up to $10,000 and/or imprisonment of up to 5 years are available penalties. Compliance with the data requirement for identification of 50 percent or more ownership by another entity is not high, however. The 1972 "corporate returns" book published by the IRS indicated that over 152,000 firms of the 1,800,000 that filed returns did not disclose whether or not their ownership was domestic or foreign.

INTERNAL REVENUE SERVICE

REPORT: Form 1120F, U.S. Income Tax of a Foreign Corporation

I. PURPOSE OF REPORT--Provides information for reporting and collecting income taxes of foreign corporations.

II. REPORTING ENTITIES--Foreign corporations having income from U.S. sources and/or are engaged in a trade or business in the U.S. during the taxable year. Either the corporation's officers or an assigned agent.

III. GENERAL DATA COLLECTED--For income from U.S. sources not effectively connected with a trade or business in the U.S., reports on income from interest, dividends, rents, royalties and other sources and the name and address of the U.S. payer. For effectively connected U.S. income, reports of 10 categories of gross income and 15 types of deductions; assets, liabilities and other financial information.

IV. REAL ESTATE DATA--

1. Foreign corporations wishing to be taxed at regular corporate rates and which have income from the exchange or sale of real estate or from rents or royalties from natural resources file a schedule listing the location of all such properties, improvements made thereto, and the extent to which the taxpayer has a direct or beneficial ownership or interest in each.

2. Foreign corporations with effectively connected U.S. income separately identify the total value of land they hold. However, this land is not necessarily all in the United States just all connected with the U.S. trade or business.

3. All gains and losses realized from the sale or exchange of property, by location and size of the property, as reported on Schedule D--Capital Gains and Losses. Included in this schedule is the date the property was acquired, the date sold, the gross sales price, and the cost of subsequent improvements made to the property after the acquisition.

V. DATA CHARACTERISTICS--

1. Frequency and Timing: Annual, by 15th day of third month after end of company's fiscal year.

2. Number Received: Approximately 1,000.

3. Identification of Investors: Name, address and country of corporation. If 50% or more of the voting stock of the reporting firm is owned (directly or indirectly) by single person or other entity, the name, address, and percentage owned by that entity is reported.

4. Present Extent of Disclosure: Some aggregate corporate data published in Corporation Income Tax Returns, but nothing regarding real estate.

5. Availability of Data: Besides what is published, aggregate data can be made available, providing the identity of individual taxpayers is not divulged. The Disclosure Act and Tax Reform Act of 1976 prescribe strict limitations on IRS in disclosing individual information.

6. Verification and Compliance Penalties: Investigative agents and subpoena powers can be used to investigate selected returns. Maximum fines of up to $10,000 and/or imprisonment of up to 5 years are available penalties.

APPENDIX I

ANALYSIS OF EXISTING FOREIGN INVESTMENT IN REAL ESTATE MONITORING SYSTEM

1. Overall Descriptions of Existing Registration Systems

Several governmental units have established systems for direct registration of foreign investment in real estate. Four such systems are discussed below. After a brief description of each system, their various reporting and processing characteristics are compared.

a. State of Iowa.--In 1975 the Iowa General Assembly enacted the Farm Corporation Reporting Bill. This bill requires corporations, limited partnerships and nonresident aliens to file an annual report with the Iowa Secretary of State if they are engaged in certain farm related activities or land ownership. Several perfecting amendments to the law were made in 1978 which have the effect of clarifying and increasing the reporting requirements. Iowa represents the most comprehensive and oldest example of a State government monitoring foreign investment in its real estate.

b. AFIDA legislation.--The Agricultural Foreign Investment Disclosure Act (AFIDA) of 1978 became law on October 14, 1978. It is being administered by the U.S. Department of Agriculture's Agricultural Stabilization and Conservation Service (ASCS) and its 2,700 field offices. Reporting is required for all nonresident aliens with anything other than a security interest in agricultural land. Both an initial report of all present holdings and interim reports on on-going land transfers are required. Final regulations implementing the AFIDA legislation were issued on February 6, 1979.

c. Bureau of Economic Analysis (BEA).--The BEA conducts several surveys and studies of foreign investment in the United States. Acting in part in response to increased congressional and public interest in real estate investment by foreigners, the BEA developed two new reporting requirements for foreign-owned businesses in 1978 which have significant real estate information components as well as questions concerning various other economic aspects of the businesses. While the real estate information requested covers all types of land, the effect of the 200-acre or $5 million in assets, revenues, or losses minimum, reporting thresholds for the BEA report on existing assets (BE-15) tends to favor reporting of agricultural land.

d. Canadian legislation and restrictions--In the past decade, the Canadian Provincial governments and the Canadian Federal government have developed a series of laws and regulations which monitor or restrict foreign investment in Canadian real estate. For the purpose of this report, we examine selected aspects of Provincial laws, particularly Ontario's Land Transfer Tax Act, and the Canadian Foreign Investment Review Act (FIRA) in order to evaluate and compare the variety of reporting requirements existing in a social and economic environment quite similar to the United States.

2. General Conclusions About Existing Systems

- There are many substantial differences among the approaches used regarding types of data collected, reporting thresholds established, timing of reports, the data collection and verification processes used and analysis performed.

Almost every aspect of the systems compared there are significant amounts of deviation. This indicates that no single system or set of approaches has emerged as clearly superior. The lack of uniformity and consensus may be due in part to the newness of these systems--all have been initiated within the last 5 years.

- Several of the systems focus exclusively on agricultural land and have characteristics unique to dealing with this type of real estate.

Examples of aspects of these systems which appear uniquely appropriate for agricultural/timber land are the heavy reliance on local field office and private citizen knowledge about landownership for ensuring report submission compliance (in the Iowa and AFIDA cases) and equating purchase price (to be adjusted on a general basis for inflation) with current real estate value since the value of the land itself usually exceeds the depreciable assets on the land (AFIDA example). These aspects may not be transferable to a system which has a large urban land component.

- Only the Iowa system collects data on land owned by non-foreign entities which can be used for making comparisons of various aspects of foreign versus domestic ownership.

One of the most important functions of these systems is to analyze the characteristics and impacts of foreign ownership of real estate, compared with similar property domestically owned. However, except for the case of the Iowa system, which requires reports from all domestic corporations and limited partnerships as well as from nonresident aliens, no information is required or is generally otherwise available pertaining to domestic ownership patterns. This makes determination of the effect of foreign ownership on prices, uses, and other socioeconomic factors almost impossible to achieve.

- Some reporting requirements appear to be excessively burdensome and/or result in submission of trivial or conflicting data.

Examples of instances where the existing reporting systems result in duplicative, conflicting, or trivial information are:

a. Reporting of leaseholds as well as title ownership--Long term leases can result in the lessee exercising control over property and so are properly required to be reported by all the systems examined. However, apparently no system has made title ownership and leaseholds of the same property mutually exclusive. This can result in two or (in the case of subleases) more "owners" being required to report the same piece of property. To permit meaningful analysis only one entity should be considered as having an active or controlling interest at any given time. This appears to be an important element to consider in a system which includes urban land, given the extensive use of leases and subleases there.

b. Failure to set a cumulative percentage interest threshold.--Several systems recognize the fact that a chain of corporate owners often exists and have established a cumulative foreign interest standard (e.g., 25 percent aggregate threshold in Iowa). The AFIDA system provides no such aggregate threshold, however, and may result in a burdensome requirement that forces corporations to do extensive searches of their ownership chain's composition and report on foreign interests which are trivial.

c. Reporting of all leases is currently required by the Iowa and BEA reports.--This results in very short-term leases being reported, although meaningful control remains in other hands.

- Data verification and reporting compliance appears most successful when the system is coupled to land transfer tax or assessment requirements.

The Iowa and Ontario systems have integrated their deed certification and recording activities with their foreign ownership in real estate monitoring. This is a data verification tool unavailable under a national monitoring system, given the decentralized methods of real estate taxation in the U.S.

3. Detailed Description of Existing Systems

The following pages present a description of the characteristics of the existing systems based on the technical, administrative, and economic project criteria:

EXHIBIT A-1

COMPARISON OF EXISTING REGISTRATION SYSTEMS

I. TECHNICAL DATA REQUIREMENTS	IOWA	AFIDA	BEA	CANADIAN
A. Ownership Information				
1. Name, address, nationality	o Name, residence and citizenship of owners required. o Report name and address of person in United States in charge of daily operations.	o Individuals and corporations report name and "address," individual owners also report citizenship. o Also report name, address and telephone number of foreign investor representatives. o Organizations submit principal place of business.	o Name and address but not citizenship of owners required.	o Name, address and telephone number of applicants.
2. Type of owner	o Filers identify if they are corporations, limited partnerships, or foreign individuals.	o Ownership categories are individual, governments, or seven choices for kind of organization (e.g., trust, partnership, etc.).		o Number of employment visa or type of alien status.
3. Percentage of foreign interest triggering reporting requirement	o 10% or more foreign interest by a single entity or 25% aggregate foreign interest (direct or indirect).	o 5% or more individual or collective foreign ownership (direct or indirect) of any owning entity.	o 10% or more foreign interest.	o FIRA has 5 percent single-person ownership threshold for a public corporation, 20 percent for a privately held business. o Ontario transfer tax for aliens applies to entities whose voting rights are 50 percent or more foreign-owned or with a single person owning 25 percent or more of such rights.
4. Types of interest required to report				
- Leases	o Includes all leases.	o Leases of 10 or more years only.	o All leases included.	o Quebec, Ontario laws have 40/50-year-lease thresholds, respectively.
- Stock, limited partnerships	o All forms included.	o All forms included.	o Voting stock only.	o Most Canadian laws refer to voting stock ownership.
- Land contracts, other future interests	o Not covered.	o Specifically included.	o Not covered.	o Excludes only transfers of land made to secure a debit or transfers in which the beneficial ownership has not changed.

EXHIBIT A-1
(continued)

COMPARISON OF EXISTING REGISTRATION SYSTEMS

I. TECHNICAL DATA REQUIREMENTS	IOWA	AFIDA	BEA	CANADIAN
- Trusts, other non-beneficial forms of ownership	o Concerned with beneficial ownership. Excludes entities acting in a fiduciary capacity.	o Includes any interests except a security interest.	o Nonbeneficial ownership excluded.	o Beneficial ownership and control main concern. Trusts 50% foreign-owned also must report.
- Mineral, water surface, other rights and interests	o Covers farming--surface cultivation--only.	o All forms included.	o Only mineral rights included.	o Includes all leases, rights and interests.
5. Non-foreign seller/buyer information	o No requirements.	o Name, address, citizenship of person acquiring land from foreign investor is required.	o No requirements.	o No requirements.
6. Beneficial ownership	o Requires listing of all beneficial owners over percentage interest thresholds of 10% for individuals and 25% aggregate.	o Asks for list of names, addresses, citizenship/country of incorporation or principal place of business of all foreign persons holding 5% or more interest.	o Name and address of entities holding a 50% or more direct voting interest in U.S. affiliate required.	o Name, address, citizenship of applicant of new foreign purchaser required.
B. Real Estate Characteristics				
1. Type of real estate	o Deals with farmland only.	o Includes farmland, ranches, land used for timber production or other forestry items only.	o All land included. Does not ask for differentiation of land owned.	o All land subject to transfer tax in Ontario, recreational and farmland restricted for non-residents.
2. Value of land owned	o No requirement.	o Asks for purchase price or estimated value at time of acquisition; estimated current value or selling price; outstanding amount owed on land.	o Requests value indirectly through balance sheet identification of property's book value for existing assets. Also asks "historical" value.	o Past purchases not queried. Current purchase price is required by Ontario and affidavits from parties involved certifying purchase price.
3. Size and location of land	o No minimum size for reporting. o Asks for number of acres by township and county for each parcel owned.	o Has minimum threshold of 1 acre and $1,000 in annual agricultural sales for requiring reporting. o Asks for legal description of land, county it is in, number of acres held. Separate parcels in same county can be jointly reported.	o Report on existing assets (BE-15) has 200-acre aggregate ownership threshold. Report on new U.S. affiliate establishments (BE-13) has no minimums. o Land described in terms of total acres per State.	o FIRA has $250,000 business assets or $3,000,000 gross revenue minimums.

COMPARISON OF EXISTING REGISTRATION SYSTEMS

I. TECHNICAL DATA REQUIREMENTS	IOWA	AFIDA	BEA	CANADIAN
4. Use of land	o Specific questions on farm operations asked, e.g., number and type of livestock, crops planted, etc.	o Asks number of acres used for crop, pasture, timber, other. Also asks relationship of foreign owner to producer (e.g., same, manager, sharecropper, etc.) and whether or not producer changed after ownership changed.	o No data requested beyond employer identification number used for tax filings for existing assets. o Newly established U.S. affiliates list primary use.	o FIRA has extensive set of questions and criteria for permitting foreign acquisitions of Canadian businesses (and therefore land). o Ontario has 20% tax on recreational land and farmland purchased by foreigners.
5. Purpose of purchase	o No questions.	o Requests indication of intended use--agricultural or nonagricultural.	o No questions.	o FIRA has extensive justifications and questions asked prior to approval of acquisition.
6. When, how purchased	o No questions.	o Asks for instrument used (e.g., cash, installment, inheritance) and date of acquisition.	o No questions.	o Concerned with proposed and ongoing acquisitions only.
C. Frequency of Report Filing	o Annual reports required for all land held. o No other requirements.	o One-time reports required for all existing holdings. o Individual reports required within 90 days after: (a) an acquisition or disposition of property by a foreign investor is made; (b) entity becomes or ceases to become a foreign person as defined in the AFIDA.	o Annual report of existing assets (BE-15) of larger firms. o New affiliates required to submit report within 45 days of establishment of new entity.	o FIRA has preacquisition notification requirements.
D. Reporting Requirements for Intermediaries	o No requirements.	o No requirements.	o Intermediaries must file BE-14, a form requesting data on the name, address of foreign purchaser, date of transaction, and value of acquisition.	o Affidavits required on valuation of transactions involving restricted land.

COMPARISON OF EXISTING REGISTRATION SYSTEMS

II. ADMINISTRATIVE CHARACTERISTICS	IOWA	AFIDA	BEA	CANADIAN
A. Type of Forms Used, Manner Used 15/	o Single sheet, both sides used for all land owned. Investors provide added information, if required, on own sheets which they attach.	o Single sheet with reverse used for addenda. Separate forms required for each county in which land is held.	o Eight-page form with accompanying instructions. Intermediaries prepare separate forms.	o Extensive data required on proposed land use, owner, amount of sale, etc. for FIRA. No specific forms utilized
B. Methods of Form Distribution and Collection	o Mail directly to corporations and nonresident aliens known to hold farmland in Iowa. Also mail to State bar, CPA, banking associations which come into contact with those required to report.	o Forms distributed to the 2,700 extension service offices which mail them to known foreign investors in agricultural land. Also are utilizing national and local associations to publicize the effort.	o Forms mailed to businesses known to have foreign ownership. Also mailed to realtors and other professionals servicing foreign investors.	o Local Ministry of Revenue offices in Ontario are responsible for form distribution collection.
	o All forms mailed back directly to Iowa Secretary of State.	o Three forms sent to USDA field offices where land is held. Field offices transmit one copy to USDA headquarters and one to local county officials.	o Form mailed back to BEA in Washington.	
C. Data Tabulation and Analysis Techniques	o Key data are transferred onto another form suitable for computer scanning.			
	o Annual reports are issued by the Secretary of State's office containing analyses of data submitted. No further analysis is done to compare data with data on domestically owned farms.	o AFIDA legislation asks for annual reports on the effects of foreign holdings, particularly on family farms and rural communities. This will be done by ESCS, a different USDA unit than the data collection organization.	o Reports are issued which provide aggregate data divided into SIC codes and other types of business classifications.	o FIRA annual reports are issued summarizing number and type of new investments, numbers approved and rejected.
D. Interaction with Other Government Units	o County assessors and recorders review records to identify foreign owners and corporations holding farmland.	o Local USDA offices send copy of AFIDA form to local county offices where land is held.	o Names of new foreign-held businesses are obtained from the Office of Foreign Investment in the United States.	o Ontario Ministry of Revenue's field offices implement tax collection and preliminary land status judgements. Central office handles requests for relief of 20 percent tax.
	o State Department of Revenue forwards copies of documents (Statement of Value) which they receive as a result of real estate transfer regulations.			

15/ The Immigration and Naturalization Service uses a postcard system for submission of annual alien status reports. The postcards are available at all U.S. post offices and are returned to a central location where a contractor tabulates selected data items. About 5,000,000 of these forms are filed every year.

EXHIBIT A-1
(continued)

COMPARISON OF EXISTING REGISTRATION SYSTEMS

II. ADMINISTRATIVE CHARACTERISTICS	IOWA	AFIDA	BEA	CANADIAN
E. Verification	o Heavy reliance placed on private citizen knowledge concerning local landownership. Citizens are informed by newspaper, association contacts by Secretary of State's office. o Use of county recorders and assessors and Dept. of Revenue information also supplements verification effort. o Preprinted forms utilized to indicate to reporters incomplete or incorrectly filed forms.	o The USDA's field offices will be responsible for identifying instances of noncompliance or inadequate completion of the report form.	o Use newsclippings on new acquisitions and intermediary reporting requirements to identify new real estate owners.	o Use affidavits from parties involved in the transactions and Ministry of Revenue transfer tax collection offices in Ontario.

COMPARISON OF EXISTING REGISTRATION SYSTEMS

III. ECONOMIC CHARACTERISTICS	IOWA	AFIDA	BEA	CANADIAN
A. Direct Costs to Government				
1. Forms preparation and mailing	o Initial costs were high due to mailing and printing costs for 60,000 forms sent to all registered corporations. Subsequent mailings have been lowered to 2 to 3,000 per year.	o ASCS estimates first year costs at $500,000, including forms collection.	o Entire cost to BEA of conducting BE-15 survey of 1,500 firms was $150,000. o Cost of conducting BE-12 comprehensive survey of 7,200 firms in 1974 was $1,500,000.	o Costs not separately identified for this program.
2. Data collection and verification	o One full-time clerical person used primarily for this purpose. Use of county officials equals roughly two years of effort for their support activities.			o Same as above.
3. Analysis	o Partial commitment of one professional staff for annual report.	o First year costs estimated at $100,000; subsequent costs at $200,000 per year.		o Same as above.
B. Direct Cost to Reporters				
1. To foreign investors	o Time required to complete form ranges to many hours, depending on number of parcels held and extent of farm operations.	o Single-parcel owners can complete forms in one-half hour. Owners of many parcels (e.g., large oil companies) in different counties will have to complete many forms. Obtaining data on value of land could take extensive research.	o Use of single form diminishes time required. Display of amount of land held by State can consume considerable time.	o Costs incurred due to taxes and affidavits. Forms are very brief.
2. To intermediaries	o No reporting required.	o No reporting required.	o Reporting on each transaction involving foreign investors establishing a new U.S. affiliate takes about one-half hour; about 400 such reports expected each year.	o Required to submit affidavits attesting to valuation.

EXHIBIT A-1
(continued)

COMPARISON OF EXISTING REGISTRATION SYSTEMS

III. ECONOMIC CHARACTERISTICS	IOWA	AFIDA	BEA	CANADIAN
C. Indirect Costs to Foreign Investors				
1. Disclosure of sensitive business information	o Food processors information is confidential. Other information is public. Given highly competitive nature of farming and large number of entrepreneurs, other farm business data are not highly sensitive.	o Purchase prices, location, and name of purchaser are required within 90 days of acquisition. This may present problems in some instances to those wishing to acquire land without divulg- that a single entity (themselves) is behind all purchases in a certain area. o Certain companies may be harmed by competitors which learn the extent of mineral rights and other interests (e.g., amount of timberland). This is particularly sensitive data in cases where there are only a few large competitors (e.g., oil companies).	o Only aggregate data are released, so no single firm's interests are identified.	o All information submitted under FIRA is treated as confidential.
2. Discouraging of investment	o Beneficial ownership disclosure tends to discourage foreign investments from countries with currency restrictions.	o Same as in Iowa case. Requirement that on-going transactions be reported would discourage certain developers, as noted above.	o Not a factor since data are confidential.	o 20% Ontario transfer tax explicitly established to discourage foreign investment. o FIRA allows direct rejection of foreign investment not deemed beneficial to Canada.
D. Penalties	o $1,000 fine is penalty for failure to file, coupled with $100 per day fine after notice of failure has been served to the party involved.	o Fine of up to 25% of the fair market value of the foreign interest in the land is penalty.	o Willful failure to report can lead to $10,000 fine.	o False affidavits punishable by fine of up to $1,000.

APPENDIX II

VOLUME ESTIMATES METHODOLOGY

I. Annual Transfers.--The steps involved in calculating annual transfers are:

Step #1: Determine total number of parcels and remove farm and single-family residences.

	(In Millions)
o Total number of privately held parcels . .	88.2
Minus:	
- Single family parcels	48.8
- Agricultural land (already being captured by AFIDA).	13.9
Subtotal, all other	25.5

Step #2: Derive number of annual transactions in this group of real estate.

- o Estimated number of annual total transactions is 7 million which represents 8 percent of all parcels;
- o Agricultural land transaction rate estimated at 3 percent per year, or about 420,000 parcels annually;
- o Single-family dwellings estimated turnover rate is 10 percent per year, or about 4.9 million parcels each year; and
- o The remaining parcels sold annually would be about 1.7 million parcels/year (7 million minus 420,000 minus 4.9 million).

Step #3: Estimate percentage of foreign purchases of parcels annually.

- o Source #1 (USDA Survey of Land Ownership) estimates foreign ownership at one percent (LOW estimate); and
- o Source #2 (Census of Business) estimates a 1.9 percent foreign component (HIGH estimate).

Step #4: Estimate number of parcels acquired by foreigners annually.

- o LOW estimate--1 percent X 1.7 million = 17,000
- o HIGH estimate--1.9 percent X 1.7 million = 32,300

Step #5: Add effect of property rights and leases acquired.

- USDA survey estimates that 10.5 percent of all parcels have some rights held by others;

- USDA survey estimates that 8.8 percent of land is leased to another entity;

- LOW estimate--

17,000 X 10.5 percent (property rights)	=	1,785
17,000 X 8.8 percent (leases)	=	1,496
Ownership acquisitions	=	17,000
Subtotal, LOW estimate		20,281

- HIGH estimate--

32,000 X 10.5 percent	=	3,360
32,000 X 8.8 percent	=	2,720
Ownership acquisitions	=	32,000
Subtotal, HIGH estimate		38,080

Step #6: Account for dispositions of ownership, rights, and leases.

o LOW estimate of acquisitions	20,281
o Add equal number of sales	20,281
Total, LOW estimate	40,562
o HIGH estimate of acquisitions	38,080
o Add equal number of sales	38,080
Total, HIGH estimate	76,160

- Economic estimates were made from these figures based on the experience of the BEA's surveys (BE-15 and BE-12) discussed earlier. The total cost of these surveys has averaged $100 per survey.

Assumptions used in volume estimates.--The steps involved in making assumptions regarding volume estimates are:

Step #1 Assumptions

- That the total number of privately owned parcels is 88.2 million in 1979. The number of parcels has been steadily rising--in 1966 it was estimated at 74.8 million and in 1971 at 83.0 million. (Source: Land Title Recording in the United States: A Statistical Summary. Moyer, Behrens, and Wunderlich, pp. 11-12 and pp. 33-35).

- That nonresident aliens do not own a significant number of nonincome-producing single family parcels, since these parcels (48.8 million) have been excluded from our model reporting requirements and from the volume estimate calculations.

- That trusts and other fiduciaries would not be required to report on holdings which they do not beneficially own. The extent of holdings which such trusts control but do not own is not known.

Step #2 Assumption

- Source used for relative rates of property transactions: National Realtors Association.

Step #3 Assumption

- That foreign purchases range between 1 percent and 1.9 percent of total acquisitions. The 1 percent and 1.9 percent figures relate to estimates of current ownership, not a current rate of foreign participation in real estate transactions. However, no other estimates were available.

Step #4 Assumption

Same as in Step #3.

Step #5 Assumptions

- Property rights and lease projections are based on a single source--a USDA voluntary survey which had 38,000 respondents.

- Foreign ownership of property rights and holdings of leases may be subject to substantial deviation from the assumption that they are proportional to domestic behavior.

Step #6 Assumpiton

- That foreign acquisition of real estate is as frequent as disposition of real estate, resulting in a doubling of reporting.

Chapter 6

LEGAL ASPECTS OF SINGLE-PURPOSE MONITORING SYSTEMS

J. Peter DeBraal, Donna K. Ralston
Donald M. Baron and Rolland L. Morse*

The preceding Chapter 5 includes a discussion of the legal feasibility of implementing Scenarios I and II in terms of legislative and administrative-rulemaking changes. This chapter examines some additional legal issues relating to the implementation of these scenarios: (1) the constitutionality of Federal information gathering, (2) a summary discussion of the constitutionality of discriminating against aliens, (3) the effect that international obligations of the United States may have on the implementation of Scenario I, and (4) limitations on the penalties that may be imposed under Scenario I.

CONSTITUTIONALITY OF FEDERAL INFORMATION-GATHERING **/

Although neither Scenarios I nor II place any actual restriction on foreign investment, Scenario I, at least, would require disclosure of certain information, and this constitutes Federal regulation of foreign investment in real estate. Since all Federal regulatory powers must have their ultimate basis in the Constitution, it is necessary to examine what, if any, constitutional bases exist for the regulation proposed in Scenarios I and II.

The Constitution does not grant the Federal Government any specific power to regulate the acquisition and holding of real estate, so we must look to the enumerated powers granted to Congress. 1/ One of these, the commerce clause, grants to Congress the power "to regulate Commerce with foreign Nations, and among the several States...." 2/

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*/ This chapter was prepared by staff members of the Economics, Statistics, and Cooperatives Service, USDA. J. Peter DeBraal, General Attorney; Donna K. Ralston, Paralegal Specialist, student, Catholic University Law School; Donald M. Baron, Agricultural Economist, member of the Ohio Bar; Rolland L. Morse, Legal Technician, student, Antioch School of Law. The authors of the particular sections of this chapter are identified at the appropriate places.

**/ This section was prepared by Rolland Morse.

1/ U.S. Const. art. 1, §8.

2/ *Id.* art. 1, §8, cl. 3.

The acquisition of U.S. real estate by a foreign person undoubtedly constitutes commerce under the meaning of the commerce clause. What is not so immediately obvious is whether the mere holding of real estate by a foreign person constitutes commerce under the commerce clause, thus making it susceptible to Federal regulation. An examination of Wickard v. Filburn, 3/ and other of the U.S. Supreme Court's commerce clause decisions of the last 40 years, indicates that the commerce clause probably is broad enough to include the mere holding of real estate. 4/

In Wickard, the Court upheld the Agricultural Adjustment Act of 1938, even though it extended "federal regulation to production not intended in any part for commerce but for consumption on the farm." 5/ The Court held that artificial distinctions as to whether the effect on commerce was "direct," "substantial," or "material" were no longer useful. Mr. Justice Jackson stated the new doctrine in the majority opinion: "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce...." 6/

Thus, it seems likely that the Federal Government, as part of its effort to regulate both interstate and foreign commerce, may require the registration or reporting of the ownership of real estate, since the use to which the owner puts the land may affect commerce.

In addition to its commerce power, Congress has authority over naturalization, 7/ with the exclusive power to admit and expel aliens. It also has the power to impose contingencies upon the admission of aliens. 8/ One possible contingency would be to require aliens present in the United States to report the acquisition and ownership of real estate.

Congress is charged with the authority to "raise and support Armies," 9/ but that power has long ago been expanded to the general power to provide for the national defense. In Ashwander v. Tennessee Valley Authority, 10/ the Supreme Court upheld, under Congress' power to provide for the national defense, the Federal Government's authority to build a dam and electricity-generating plant. Although the construction originally had been authorized by a 1916 Act of Congress to provide power for munitions production, the Court found that the electric energy itself constituted "national defense assets." The Court reached this decision even though it was peacetime and there were no present plans to use the electricity in the production of munitions.

3/ 317 U.S. 111 (1942).
4/ See, e.g., United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
5/ 317 U.S. 111, at 118.
6/ Id. at 125.
7/ U.S. Const. art 1, §8, cl. 4.
8/ Boutilier v. INS, 387 U.S. 118 (1967).
9/ U.S. Const. art. 1, §8, cl. 12.
10/ 297 U.S. 288 (1936).

Possibly data on the foreign ownership of U.S. real estate also might constitute "national defense assets" even though there are no present plans to use the data for national defense.

It appears that Congress possesses the requisite constitutional authority, individually or under a blending of the above theories, to implement either Scenario I or II. 11/

CONSTITUTIONALITY OF DISCRIMINATION AGAINST NONRESIDENT ALIENS

A previous report to the Congress on foreign investment in the United States contained a discussion of legal regulation of alien landownership in the United States. 12/ In that discussion, the author addressed the constitutional requirements of equal protection and due process as applied to State and Federal restrictions on alien investment in U.S. real estate. Although that discussion dealt with these requirements in the context of State and Federal restrictions on alien ownership of real estate, the analysis is equally applicable to the monitoring systems discussed in this report.

The author pointed out that, while the equal protection clause binds both State and Federal Governments 13/ and protects citizens and aliens alike, 14/ its application to aliens has been directed toward resident aliens, not nonresident aliens. 15/ The author noted the following two levels of protection which have been established under the equal protection doctrine. If a law establishes classifications which are suspect or affect fundamental rights, the higher or stricter test applies and the State or Federal Government must show a compelling public interest to uphold the law. 16/ If, however, the classification

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11/ For a discussion of the Constitution's welfare and necessary and proper clauses and a further discussion of the commerce clause, see chapter 11.

12/ F.L. Morrision, Legal Regulation of Alien Land Ownership in the United States, in 8 U.S. Dept. of Commerce, Report to the Congress, Foreign Direct Investment in the United States, app. M (1976). This material was expanded and appears as Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621 (1976).

13/ Morrison, Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 639, citing Shapiro v. Thompson, 394 U.S. 618 (1969); Bolling v. Sharpe, 347 U.S. 497 (1954).

The fifth amendment to the Constitution does not contain an equal protection clause, as does the fourteenth amendment, which applies to the States. However, in 1954, the Supreme Court recognized that the fourteenth amendment guarantee of equal protection is clearly implicit in the fifth amendment and is extended to Federal action. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

14/ Morrison, supra note 13, at 639, citing Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

15/ Morrison, supra note 13, at 639.

16/ Id., citing Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); Loving v. Virginia, 388 U.S. 1, 10 (1967); McLaughlin v. Florida, 379 U.S. 184, 192-94 (1964).

is not suspect or does not affect fundamental rights, then the lower test applies and the State or Federal Government need only show a rational relationship between the classification and its intended purpose. 17/

Reviewing recent cases in which the Supreme Court has added classifications based on alienage to its list of suspect categories, 18/ the author concluded:

> The rights protected by the higher test in equal protection doctrine have been basic human rights: Either protection from racial and religious discrimination, as in the case of the suspect classifications, or protection of first amendment rights, as in the fundamental freedoms cases. Although these rights may have proprietary elements, they are not primarily rights of an economic nature. Indeed, the lower-level test is sometimes imprecisely characterized as a test for economic and social legislation. The statutes that have been struck down as unconstitutionally discriminating on the basis of alienage adversely affected the ability to survive--through welfare benefits, employment by the state, and eligibility for a profession--of persons permanently residing in the United States and for most purposes indistinguishable from American citizens....
>
> But what about the alien investor who is not a resident and is making an investment for purely economic motives? It is difficult to classify his claims in the same category with a welfare claimant's bid for medical assistance or a permanent resident's effort to enter a gainful profession. It is, indeed, difficult to categorize his claim as one of fundamental concern. Although he is clearly a member of a minority group, he is not part of an "isolated minority" meriting special judicial protection, for he, unlike the permanent resident alien who has abandoned his homeland, can expect the diplomatic support of his national government. Thus, despite the broad language of some of the issues, his claim may be reduced to one judged by the "lower" constitutional standard. Under this standard, legislation restricting his ownership of land [or monitoring his real estate investments] is likely to be upheld against equal protection. There is clearly a rational relationship between the legislative classification, excluding aliens [or monitoring their investments], and its ostensible immediate purpose, exclusion of alien influence from the State....
>
> ....

17/ Morrison, *supra* note 13, at 639-40, *citing* Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-27 (1961); Williamsburg v. Lee Optical Co., 348 U.S. 483, 489 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

18/ Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973).

> What, then, is the impact of the equal protection doctrine on existing and potential legislation? The outlines are clear. It forbids wholesale discrimination against resident aliens by the state and federal governments. This pertains equally to the general prohibitions and restrictions on alien ownership and to legislation dealing with alien inheritances [or legislation establishing monitoring systems for alien real estate investment]. Thus, the doctrine is hardly significant for existing state laws, since many of these already exempt residents.
>
> The equal protection clause would not appear to be an obstacle to legislation restricting the rights [or monitoring the investments] of the nonresident foreign investor.... A nonresident alien may be unable to rely upon the higher test if his proprietary interest is not coupled with some other more fundamental personal right, and he will have little chance of convincing a court that the restrictions imposed on him are not rationally related to the purpose of excluding foreign investment. 19/

Turning to the substantive due process requirements, 20/ the author stated:

> To satisfy [these] requirements, the state [or federal government] need show only a rational relationship between the purpose of the law and a legitimate [governmental] interest. The close connection between equal protection and due process is apparent. Equal protection addresses the legitimacy of the classification; substantive due process addresses the legitimacy of the purpose of the law; in combination, they address the legitimacy of the purpose of the classification. 21/

Assuming that the legitimate purpose of a registration or reporting system is (1) to obtain accurate data on the extent of nonresident alien investment in U.S. real estate, (2) to assess the impact of that investment on the U.S. economy, and (3) to devise intelligent policies to deal with that investment, 22/ it seems unlikely that such a registration or reporting system would be invalidated on substantive due process grounds.

19/ Morrison, *supra* note 13, at 642-44.

20/ U.S. Const. amends. V & XIV.

21/ Morrison, *supra* note 13, at 645.

22/ With respect to concerns over foreign investment in U.S. farmland, *see generally* *Impact of Foreign Investment in Farmland: Hearings on H.R. 13128 and Related Bills Before the Subcomm. on Family Farms, Rural Development, and Special Studies of the House Comm. on Agriculture*, 95th Cong., 2d Sess. (1978); Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Foreign Investment in United States Agricultural Land (Comm. Print 1979).

IMPACT OF INTERNATIONAL OBLIGATIONS OF THE UNITED STATES ON A FEDERAL REGISTRATION SYSTEM *

Enactment of a Federal monitoring system, calling for the registration of all nonresident alien investment in U.S. real estate, poses the potential for conflict with certain bilateral treaty and multilateral agreement obligations of the United States. This section examines the impact of those treaties and international agreements on subsequent Federal legislation establishing a system for monitoring foreign investment in U.S. real estate.

In examining the potential conflict of a Federal monitoring system with U.S. international obligations, two types of obligations are relevant. Of great significance are the approximately 40 23/bilateral treaties of friendship, commerce, and navigation (hereinafter referred to as FCN treaties), which regulate trade and investment relations of the United States with other signatory nations. 24/ FCN treaties cover a variety of problems, from the entrance of goods and ships into the territories of the signatory parties to the exemption of nationals of one party from compulsory training or service in the armed forces of the other. Although the word "friendship" in the title presupposes friendliness and good will between the United States and the other contracting party, these treaties are not primarily political in character. 25/ Generally, FCN treaties establish solid guidelines and procedures to regulate and protect natural juridical persons' specific commercial and private legal rights, including those relating to land use. Provisions regarding landownership and related rights, although clear and precise, are merely incidental. 26/

In contrast to the FCN treaties are the multilateral agreements and declarations adopted by the Organization for Economic Cooperation and

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*/ This section was prepared by Donna Ralston.

23/ U.S. Dept. of State, Pub. No. 8934, Treaties in Force (1978).

24/ See generally Morrison, supra note 13, at 656-61; Note, The Rising Tide of Reverse Flow, 72 Mich. L. Rev. 551, 568-77 (1974); Walker, Convention of Establishment Between the United States and France, 54 Am. J. Int'l L. 393 (1960); Walker, Provisions on Companies in U.S. Commercial Treaties, 50 Am. J. Int'l L. 373 (1956); Walker, Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice, 5 Am. J. Comp. L. 229 (1956); Wilson, A Decade of New Commercial Treaties, 50 Am. J. Int'l L. 927 (1956); R. Wilson, United States Commercial Treaties and International Law (1960).

25/ Walker, Modern Treaties of Friendship, Commerce, and Navigation, 42 Minn. L. Rev. 805 (1958).

26/ Morrison, supra note 13, at 657.

Development (OECD). 27/ The obligations created under OECD actions are more general in scope than those created by the FCN treaties. They set forth policies designed to facilitate international trade on a nondiscriminatory basis and to encourage economic growth and financial stability in member as well as nonmember countries. 28/

Examination of the FCN Treaty Provisions

None of the FCN treaties are identical, but they can be generally classified according to the era in which they were negotiated--pre- or post-World War II. 29/ The pre-World War II treaties are more narrow in scope than those negotiated in the post-World War II era. They focus primarily on issues that posed problems for the signatory parties, such as trade, shipping, navigation, and inheritance rights.

The pre-World War II treaties may be further classified according to those negotiated between 1828-1902 and those negotiated thereafter, 1925-38. The 13 treaties concluded between the United States and Brazil, 30/ Chile, 31/ Venezuela, 32/ Ecuador, 33/ Colombia, 34/ Switzerland, 35/ Brunei, 36/ Costa Rica, 37/ Argentina, 38/ Bolivia, 39/

27/ The OECD was created by a multilateral international agreement. Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891. The members of OECD are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

28/ *See id.* art. 1, at 1732.

29/ Morrison, *supra* note 13, at 657.

30/ Treaty of Peace, Friendship, Commerce, and Navigation, Dec. 12, 1828, 8 Stat. 390, T.S. No. 34.

31/ Treaty of Peace, Amity, Commerce, and Navigation, May 16, 1832, 8 Stat. 434, T.S. No. 40.

32/ Treaty of Peace, Friendship, Navigation, and Commerce, Jan. 20, 1836, 8 Stat. 466, T.S. No. 366.

33/ Treaty of Peace, Friendship, Navigation, and Commerce, June 13, 1839, 8 Stat. 534, T.S. No. 76.

34/ Treaty of Peace, Amity, Navigation, and Commerce, Dec. 12, 1846, 9 Stat. 881, T.S. No. 54.

35/ Treaty of Friendship, Commerce, and Extradition, Nov. 25, 1850, 11 Stat. 587, T.S. No. 353.

36/ Treaty of Peace, Friendship, Commerce, and Navigation, June 23, 1850, 10 Stat. 909, T.S. No. 33.

37/ Treaty of Friendship, Commerce, and Navigation, July 10, 1851, 10 Stat. 916, T.S. No. 62.

38/ Treaty of Friendship, Commerce, and Navigation, July 27, 1853, 10 Stat. 1005, T.S. No. 4.

39/ Treaty of Peace, Friendship, Commerce, and Navigation, May 13, 1858, 12 Stat. 1003, T.S. No. 32.

Paraguay, 40/ Yugoslavia, 41/ and Spain 42/ during the 1800's and the first 2 years of the 1900's clearly illustrate that the facilitation of international investment activity had not yet become a major goal of U.S. treaty policy. One issue repeatedly addressed in these older FCN treaties is the inheritance rights of aliens with respect to real estate within the United States. Eight of the treaties 43/ contain provisions dealing with inheritance rights. 44/ Seven of these eight treaties state that if an alien is disqualified by State law from possessing the inherited realty, he shall be allowed a period, ususally 3 years, 45/ in which to sell or dispose of it. The eighth treaty does not expressly defer to the authority of State inheritance laws; rather, it allows aliens to inherit U.S. real estate and to take possession or dispose of it at will. 46/

The treaty concluded with Yugoslavia contains a provision unique to any of the FCN treaties. It provides that Serbian subjects in the United States shall be accorded most-favored-nation treatment in all that concerns the right of acquiring, possessing, or disposing of real property. "Most-favored-nation" clauses (hereinafter MFN clauses) are an important element of FCN treaties. They guarantee citizens of a contracting nation the most favorable treatment afforded

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40/ Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, 12 Stat. 1091, T.S. No. 272.

41/ Treaty of Commerce and Navigation, Oct. 14, 1881, 22 Stat. 963, T.S. No. 319.

42/ Treaty of Friendship and General Relations, July 3, 1902, 33 Stat. 2105, T.S. No. 422.

43/ The FCN treaties with Brazil, Chile, Venezuela, and Ecuador are listed in the Department of State's publication, Treaties in Force (1978), with notations that only the articles relating to commerce and navigation terminated in 1841, 1850, 1851, 1892, respectively. This would seem to indicate that the inheritance rights provisions of these treaties are still effective. However, a list entitled "FCN and Similar Treaties in Force in Whole or in Major Part" compiled by the Treaty Affairs Division Office of the Legal Advisor, Dept. of State, up to date as of March 1979, does not include those four treaties.

44/ See Appendix for a textual summary of all relevant treaty provisions.

45/ One treaty specifies no time period for disposal of the realty; one treaty allows the longest period provided by law.

46/ The Convention Relating to Tenure and Disposition of Real and Personal Property, March 2, 1899, United States-United Kingdom, 31 Stat. 1939, T.S. No. 146, applicable to Australia, the Bahamas, Barbados, Burma, Canada, Cyprus, Fiji, Gambia, Ghana, Grenada, Guyana, India, Ireland, Jamaica, Lesotho, Malaysia, Malta, Mauritius, New Zealand, Nigeria, Pakistan, Sierra Leone, Singapore, South Africa, Sri Lanka, Trinidad & Tobago, and Zambia, similarly deals with inheritance rights of aliens. If State law prohibits alien ownership, the Convention guarantees the alien a term of 3 years in which to sell the inherited property.

any alien in the United States. 47/ Requiring aliens who acquire or transfer real estate in the United States to report the acquisition or transfer to the Federal Government may be viewed as an obligation incidental to the right of acquiring, possessing, or disposing of real property. Therefore, if such a Federal monitoring system were enacted, the MFN clause in the treaty with Yugoslavia could enable Serbian investors to avoid the reporting requirements if another nation were legislatively exempted from reporting.

Between 1925 and 1938, the United States negotiated treaties with Estonia, 48/ Honduras, 49/ Latvia, 50/ Norway, 51/ Austria, 52/ Turkey, 53/ Saudi Arabia, 54/ Finland, 55/ and Liberia. 56/ Although these treaties deal with some of the same issues as the first 13 FCN treaties (i.e., 7 of the 10 treaties address aliens' inheritance rights with respect to U.S. real estate in similar language and manner), they are more comprehensive in scope.

Seven of the 10 treaties specifically permit citizens of the contracting parties to engage in a variety of activities in the United States, such as manufacturing and commercial work, without interference. They also are accorded MFN treatment and national treatment in respect to the doing of anything incidental to or necessary for the enjoyment of the activities. "National treatment" means that the Federal Government cannot impose more severe restrictions on the nationals of the other party

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47/ E.g., Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593, art. XXV, para. 4: "The term 'most-favored-nation treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country."

48/ Treaty of Friendship, Commerce, and Consular Rights, Dec. 23, 1925, 44 Stat. 2379, T.S. No. 736.

49/ Treaty of Friendship, Commerce, and Consular Rights, Dec. 7, 1927, 45 Stat. 2618, T.S. No. 764.

50/ Treaty of Friendship, Commerce, and Consular Rights, April 20, 1928, 45 Stat. 2641, T.S. No. 765.

51/ Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, 47 Stat. 2135, T.S. No. 852.

52/ Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, 47 Stat. 1876, T.S. No. 838.

53/ Treaty of Commerce and Navigation, Oct. 1, 1929, 46 Stat. 2743, T.S. No. 813; Treaty of Establishment and Sojourn, Oct. 28, 1931, 47 Stat. 2432, T.S. No. 859.

54/ Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation, Nov. 7, 1933, 48 Stat. 1826, E.A.S. No. 53.

55/ Treaty of Friendship, Commerce, and Consular Rights, Feb. 13, 1934, 49 Stat. 2659, T.S. No. 868.

56/ Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, 54 Stat. 1739, T.S. No. 956.

than it does on its own citizens. 57/ Acquiring real estate on which to construct a factory may reasonably be considered incidental to and, indeed, necessary for the conduct of aliens' manufacturing activities in the United States. Implementation of a Federal monitoring system would make it necessary for aliens to report their acquisitions and transfers of real estate for treaty-protected activities. If U.S. citizens were not required to report their real estate acquisitions and transfers, it would seem that requiring citizens of contracting parties to report would contravene the treaties' guarantee of national treatment. This potential dilemma is avoided by a stipulation in the treaties that aliens must submit to all local laws and regulations duly established when engaging in activities incidental to or necessary for the enjoyment of treaty privileges.

Citizens of the contracting parties in 6 of the 10 treaties are permitted to own, erect, or lease and occupy appropriate buildings and to lease lands for several enumerated purposes. They also are to be accorded national treatment and MFN treatment with respect to the doing of anything incidental to or necessary for the enjoyment of the foregoing privilege, but must submit themselves to all local laws and regulations. Any conflict between the national treatment guarantee and a Federal reporting requirement is, therefore, obviated.

National treatment with respect to mining coal, phosphate, oil, oil shale, gas, and sodium on the public domain is accorded to aliens in 7 of the 10 treaties. One treaty grants to the government of the contracting party the right to acquire and own land and buildings required for diplomatic or consular premises in the United States. Another treaty entitles the citizens of the contracting party MFN treatment with regard to their persons, property, rights, and interests.

Since World War II, the United States has concluded FCN treaties with China, 58/ Italy, 59/ Ireland, 60/ Greece, 61/ Israel, 62/ Ethiopia, 63/

57/ *E.g.*, Treaty with the Federal Republic of Germany, note 66 *infra*, art. XXV, para. 1: "The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

58/ Treaty of Friendship, Commerce, and Navigation, Nov. 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

59/ Treaty of Friendship, Commerce, and Navigation, Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965.

60/ Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155.

61/ Treaty of Friendship, Commerce, and Navigation, Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057.

62/ Treaty of Friendship, Commerce, and Navigation, Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948.

63/ Treaty of Amity and Economic Relations, Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864.

Denmark, 64/ Japan, 65/ West Germany, 66/ Iran, 67/ Nicaraqua, 68/ Netherlands, 69/ Surinam, 70/ Korea, 71/ Muscat and Oman, 72/ Pakistan, 73/ Belgium, 74/ Vietnam, 75/ Luxembourg, 76/ Togolese Republic, 77/ and Thailand. 78/ Nineteen of the 21 treaties, enumerate a wide range of commercial, industrial, and other business activities in which nationals and companies of the contracting party are permitted to engage within the United States. In return, U.S. citizens receive the same rights in the contracting country. The treaties also guarantee national treatment and MFN treatment with respect to the conduct of the treaty-protected activities. 79/ Only the first two treaties concluded in the post-World War II era accord aliens the additional guarantee of MFN treatment and national treatment in respect to the doing of anything incidental to or necessary for the enjoyment of the activities. Any incidental or necessary activity, however, must comply with the applicable U.S. laws and regulations.

64/ Treaty of Friendship, Commerce, and Navigation, Oct. 1, 1951, 12 U.S.T. 908, T.I.A.S. No. 4797.

65/ Treaty of Friendship, Commerce, and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

66/ Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593.

67/ Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

68/ Treaty of Friendship, Commerce, and Navigation, Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. No. 4024.

69/ Treaty of Friendship, Commerce, and Navigation, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942.

70/ Id.

71/ Treaty of Friendship, Commerce, and Navigation, Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947.

72/ Treaty of Amity, Economic Relations, and Consular Rights, Dec. 20, 1958, 11 U.S.T. 1835, T.I.A.S. No. 4530.

73/ Treaty of Friendship, Commerce, and Protocol, Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4683.

74/ Treaty of Friendship, Establishment, and Navigation, Feb. 21, 1961, 14 U.S.T. 1284, T.I.A.S. No. 5432.

75/ Treaty of Amity and Economic Relations, April 3, 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890.

76/ Treaty of Friendship, Establishment, and Navigation, Feb. 23, 1962, 14 U.S.T. 251, T.I.A.S. No. 5306.

77/ Treaty of Amity and Economic Relations, Feb. 8, 1966, 18 U.S.T. 1, T.I.A.S. No. 6193.

78/ Treaty of Amity and Economic Relations, May 29, 1966, 19 U.S.T. 5843, T.I.A.S. No. 6540.

79/ National treatment only is accorded aliens by the treaties between the United States and Belgium, Luxembourg, Togolese Republic, Thailand, Iran, Japan, and Denmark.

In addition to granting rights to engage in various activities, 20 of the 21 treaties, 80/ expressly authorize aliens to acquire real estate appropriate to the conduct of the treaty-protected activities and for residential purposes. In 15 of the treaties, these rights are limited to the acquisition of leasehold interests. Eleven of the treaties reserve to the United States the right to further limit the acquisition by aliens of interests in real estate. Under these treaties, the United States may prohibit or limit alien exploitation of land and other natural resources. The effect of such a reservation could be to prohibit aliens from engaging in agriculture, mineral resource development, and real estate speculation and development. 81/ Six other FCN treaties, however, permit resource development by guaranteeing MFN treatment in the exploration for and exploitation of minerals. As did the pre-World War II treaties, 14 of the post-World War II treaties protect the inheritance rights of aliens. If alien ownership of the inherited real estate is prohibited by State law, the treaties allow the alien a period of 3 to 5 years or a "reasonable time" in which to sell or dispose of it. Additionally, the post-World War II treaties accord the governments of four contracting parties the right to own or lease real estate for diplomatic or consular purposes. 82/

Impact of FCN Treaties on a Federal System for Monitoring Foreign Investment in U.S. Real Estate

The U.S. Constitution provides that treaties entered into under the authority of the United States shall be the supreme law of the land. 83/ The effect of such a provision is to make treaties entered into by the Federal Government within constitutional limits binding on both Federal and State courts, 84/ although not to the same extent. Where there is

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80/ Section 10 of the Protocol to the FCN treaty with Belgium expressly states that the rights of Belgians to engage in various activities shall not be construed to confer rights with respect to owning real property.

81/ Morrison, Limitations on Alien Investment in American Real Estate, 60 Minn. L. Rev. 621, 660 (1976).

82/ Eleven consular conventions concluded by the United States grant the governments of the contracting parties identical rights. *E.g.*, Consular Convention with Bulgaria, April 15, 1974, 26 U.S.T. 687, T.I.A.S. No. 8067; Belgium, Sept. 2, 1969, 25 U.S.T. 41, T.I.A.S. No. 7775; United Kingdom, June 6, 1951, 3 U.S.T. 3426, T.I.A.S. No. 2494; Ireland, May 1, 1950, 5 U.S.T. 949, T.I.A.S. No. 2984; Costa Rica, Jan. 12, 1948, 1 U.S.T. 247, T.I.A.S. No. 2045.

83/ U.S. Const. art. VI, para. 2, provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

84/ Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 273 (1909).

a conflict between a treaty and the provisions of a State statute, whether enacted prior or subsequently to the making of the treaty, the treaty will invalidate the State statute. 85/

The Supreme Court repeatedly has taken the position that a Federal statute is on a full parity with a treaty, and that if the two are inconsistent, the one last in date will control the other. 86/ Therefore, when a statute which is subsequent in time is inconsistent with a treaty, the statute, to the extent of conflict, supersedes the treaty. 87/

Although none of the FCN treaties expressly authorize the United States to monitor real estate acquisitions and transfers by aliens, neither do they expressly prohibit it or exempt any contracting party from reporting their acquisitions and transfers in the United States. Thus, Federal legislation establishing a system to monitor foreign direct investment in U.S. real estate would not directly conflict with any previously negotiated FCN treaties and would not supersede them.

A number of the treaties grant aliens the right to do anything incidental to or necessary for the enjoyment of treaty-protected activities and guarantee them national treatment in the exercise of this right. The acquisition of real estate may be incidental to or necessary for conducting business activities. If a direct monitoring system were enacted, an alien purchasing land in the United States on which to construct an office building would be required to report the acquisition to the U.S. Government. A U.S. citizen making a similar purchase would not, and the legislation would appear to implicity violate the treaty guarantee of national treatment. No violation would occur, however, because of the treaty provision requiring aliens to submit to local laws and duly established regulations when engaging in treaty-protected activities.

85/ See Hauenstein v. Lynham, 100 U.S. 483 (1880). One cannot say that a State statutory provision is wholly void as a result of a particular treaty, but only inapplicable to certain aliens who can show that the treaty applies to them; i.e., that they are citizens of the relevant country, that the treaty has been duly ratified, and that it has become part of the internal law of the United States. Morrison, supra note 81, at 659.

86/ Whitney v. Robinson, 124 U.S. 190, 194 (1888); Edye v. Robertson (Head Money Cases), 112 U.S. 580, 599 (1884). Following from this reasoning, a treaty may supersede a prior act of Congress. The courts, however, are reluctant to regard a later treaty as impliedly repealing the domestic legal effect of an earlier Federal statute unless the two are absolutely incompatible, and the statute cannot be enforced without antagonizing the treaty. Johnson v. Browne, 205 U.S. 309, 321 (1906).

87/ Reid v. Covert, 354 U.S. 1, 18 (1957); Moser v. United States, 341 U.S. 41, 45 (1951).

Even if such a provision were not included in the treaties, the courts would be reluctant to rule that the monitoring system supersedes the treaties. The United States may legally repudiate a treaty, but its obligations under international law created by the treaty are not thereby terminated. 88/ The subsequent enactment of Federal legislation inconsistent with a binding treaty constitutes a breach of international law. The courts, therefore, will attempt to avoid the breach by refusing to construe the subsequent inconsistent Federal legislation as implicity repudiating the treaty unless such purpose on the part of Congress has been clearly expressed. 89/

The Impact of OECD Agreements, Declarations, and Decisions

In December 1961, the OECD adopted the Code of Liberalization of Capital Movements, which pledged the member countries to progressively eliminate restraints on foreign investment and capital transfers. 90/ The Code contains a lengthy list of the forms of liberalization expected, including reduced constraints on direct investment, purchase and sale of securities, and financial transfers and credits. 91/ A member country, while promising to move toward liberalization, may exempt itself from specified Code provisions by filing a reservation if: (1) the country decides that its economic and financial situation justifies such a course, (2) it determines that measures undertaken in accordance with the Code's provisions result in serious economic and financial disturbance in the country, or (3) it finds that adherence to the provisions of the Code leads to adverse effects on the national balance of payments. 92/

Although the major goal of the Code is to abolish restrictions on capital movements, there is one provision that may permit restrictions on land investment or development. The Code breaks down capital movements into two categories, Lists A and B. List A includes the sale of land; List B, the purchase or development of land. A member country must file a reservation exempting itself from the application of the Code to a List A capital movement at the time the country agrees to the Code. A reservation to a capital movement contained in List B, however, may be made by a member country at any time. 93/ Thus, the United States could, at any time, file a reservation to the application of the Code to land purchase and development. Technically, then, the United States could impose restrictions on foreign land purchases without breaching international law. However, the spirit of the Code would be violated.

88/ Letter from Secretary of State, Charles Evans Hughes to Mr. Mellon (Feb. 19, 1923).

89/ *See* Cook v. United States, 288 U.S. 102, 120 (1933).

90/ OECD, Code of Liberalization of Capital Movements (1973). Of the 24 OECD member countries, 19 members, including the United States, had assented to the Code, with reservations, as of August 1973.

91/ *Id*. Annex A.

92/ *Id*. Arts. 7(a), (b).

93/ *Id*. Art. 2(b).

The Code does not create any legal barriers to the enactment of a Federal system for monitoring foreign investment in U.S. real estate. Adherence by the member countries to the liberalization standards is voluntary, and there are no international sanctions or constraints to produce compliance. Furthermore, the Department of State views a requirement that foreigners report their acquisitions and transfers of U.S. real estate, which is instituted purely for statistics gathering purposes, to be procedural in nature, not a substantive restraint on foreign investment. An Attorney Advisor in the State Department's Legal Advisor's Office said that a monitoring system established to gather information, not to screen prospective purchasers, would not interfere with the substantive rights of an alien to acquire real estate in the United States. Since the monitoring system would not substantively restrain foreign investment, it would not conflict with the goals of the Code. 94/

A Federal monitoring system of foreign investment in U.S. real estate also should be examined in the context of the Declaration on International Investment and Multinational Enterprises. 95/ Adopted by the OECD Council on June 21, 1976, the Declaration attempts to improve the foreign investment climate by setting forth guidelines for multinational enterprises operating in the member countries. 96/ The Declaration also stipulates that member countries should accord to multinational enterprises operating in their territories national treatment under their laws, regulations, and administrative practices, consistent with international law. 97/ Member countries must notify the Organization of measures taken constituting exceptions to "national treatment" within 30 days of their introduction, stipulating the specific reasons for and the proposed duration of the needed exception. 98/ Like the Code for Liberalization of Capital Movements, the Declaration is a voluntary agreement among the member countries.

94/ Interview with the Office of the Legal Advisor for Economics and Business, U.S. Dept. of State, Washington, D.C. (March 1979).

95/ OECD, Declaration on International Investment and Multinational Enterprises (1976).

96/ Id. Annex.

97/ Id. Art. 2.

98/ Organization for Economic Cooperation and Development, Decision of the Council on National Treatment (1976). Member countries were required to notify the Organization within 60 days after the date of the Decision of any measures constituting exceptions to "National Treatment" which were in effect on the date of the Decision. The United States initially notified the Organization of exceptions dealing with the right to official aid and subsidies; the right to government purchasing and public contracts; the right to acquire or charter U.S. flag vessels, vessels owned by a U.S. citizen, or shipyard facilities; and the right to freely invest at second remove. State restrictions on foreign-controlled enterprises, such as those on landownership and use, also were reported.

The State Department's Legal Advisor's Office does not feel that a Federal monitoring system of foreign investment in U.S. real estate would constitute an exception to the Declaration's "National Treatment" requirement. A State Department Attorney Advisor acknowledges that requiring foreigners to comply with a system for gathering information about their investments in U.S. real estate _is_ treatment different from that which nationals receive. The different treatment, however, relates to the procedural requirement of reporting land acquisitions and transfers. So long as the reporting system under which foreigners are treated differently from U.S. citizens is not used to impair foreigners' substantive rights to acquire and transfer U.S. real estate, the foreigners are not receiving less favorable treatment than U.S. citizens. 99/

An effect of a reporting system which would permit public disclosure of information pertinent to the sale of U.S. real estate, such as the purchaser's name, his citizenship, and the purchase price, may arguably discourage certain foreigners. The OECD agreements to which the United States is a party do not, however, commit the United States to a policy of affirmatively encouraging foreign investment in U.S. real estate, but merely to eliminating restraints on foreign investment. Since the reporting requirement would not, by its terms, restrain foreigners' access to investment in real estate or condition their ability to invest on compliance with the reporting requirement, it would not constitute a legal breach of our international obligations.

The State Department has publicly expressed its support for information-collection programs on foreign investment in the United States. In hearings before the Subcommittee on Foreign Commerce and Tourism of the Committee on Commerce in February 1976, then Deputy Assistant Secretary of State Paul Boeker noted the usefulness of S. 2839, now known as the International Investment Survey Act of 1976, 100/ which provides for compilation and publication of aggregate investment data. 101/ In June 1978, Charles F. Meissner, Deputy Assistant Secretary for Economic and Business Affairs, in hearings before the Subcommittee on Family Farms, Rural Development, and Special Studies of the House Committee on Agriculture, noted the need for the United States to increase its knowledge about inward investment, to keep the flows under constant observation, to inform the public of trends in the pattern of foreign investment, and to adjust policies if required. He stated that

99/ Interview, _supra_ note 94.

100/ 22 U.S.C. §§3101-3108 (1976).

101/ _International Investment Survey Act: Hearings on S. 2839 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce_, 94th Cong., 2d Sess. 30-31 (Comm. Print 1976) (statement of Honorable Paul Boeker).

the State Department supports the International Investment Survey Act of 1976 because it feels that the Act enables the collection of detailed data concerning source, size, and nature of foreign investments which are presently lacking. 102/

On October 14, 1978, President Carter signed into law the Agricultural Foreign Investment Disclosure Act of 1978 (hereinafter referred to as AFIDA). 103/ AFIDA, which establishes a national system for monitoring foreign direct investment in U.S. agricultural land, 104/ requires foreign persons who acquire, transfer, or hold interests, other than security interests, in agricultural land to report their acquisitions and transfers to the Secretary of Agriculture not later than 90 days after the date of such acquisition or transfer. 105/ The Secretary is required to make these reports available to the public and to report annually to the President and the Congress on the issue. 106/

The United States, when notifying the OECD in January 1979 of its amended exceptions to the Declaration's national treatment requirement, did not include AFIDA. Since the monitoring system under study is very similar in nature and function, although not in scope, to AFIDA, it may be assumed that the monitoring system would not constitute an exception to national treatment. Thus, the spirit of international investment cooperation which the Declaration promotes would not be violated by a Federal reporting requirement of foreign investment in U.S. real estate.

Conclusions

The FCN treaties to which the United States is a signatory party would not interfere with the enforcement of Federal legislation requiring foreigners to report investments in U.S. real estate. An FCN treaty and a Federal statute enacting such a reporting system would be of equal legal force. No superior efficacy would be given to one over the other. If there were a direct conflict between their provisions, the statute, because enacted subsequent to the treaty, would prevail.

102/ Impact of Foreign Investment in Farmland: Hearings on H.R. 13128 and Related Bills Before the Subcomm. on Family Farms, Rural Development, and Special Studies of the House Comm. on Agriculture, 95th Cong., 2d Sess. 62-65 (1978) (statement of Charles F. Meissner).

103/ Pub. L. No. 95-460, 92 Stat. 1263 (1978) (to be codified in 7 U.S.C. §§3501-3508).

104/ "Agricultural land" is defined in the Act as any land used for agricultural, forestry, or timber production purposes as determined by the Secretary of Agriculture under regulations to be prescribed by him. Id. §9, para. 1.

105/ Id. §2(a). Foreign persons holding any interests in agricultural land prior to the effective date of the regulations are required to submit a report to the Secretary not later than 180 days after such effective date. Id. §2(b).

106/ Id. §§5(a), (b).

None of the FCN treaties currently in force contain provisions which would conflict with the Federal reporting system. Certain treaties enumerate activities in which the alien may engage, and guarantee him national treatment in the doing of anything incidental to or necessary for conducting the activities. Such a privilege, which could be construed to authorize the purchase of real estate, is conditioned on the alien's compliance with U.S. laws and regulations.

Likewise, the multilateral agreements of the OECD pose no problem with the enforcement of a reporting system. By its terms, the reporting requirement would not restrain foreign access to investments. The system would exist solely to gather information on foreign investment, and would not be used for any purpose other than to assess the magnitude of foreign investment in U.S. real estate and its impact on the domestic economy. A foreigner's ability to acquire or transfer U.S. real estate would not be conditioned on his compliance with the reporting requirement. The reporting requirement would not be used to screen prospective real estate purchasers. The substantive rights of aliens to own real estate would not be restricted or restrained. Therefore, the OECD policies favoring freedom of international investment would not be undermined.

A monitoring system of foreign investment would be of invaluable assistance in determining who owns how much of the real estate in America. So long as the system is used solely for information-gathering purposes so that we can increase our knowledge about inward investment and is not used as a means for limiting such investment, the United States does not run the risk of breaching its international obligations.

PENALTIES */

If Congress chooses to establish a passive intelligence system for monitoring foreign investment, information will be obtained to the extent that foreign investors voluntarily comply with whatever registration requirements are enacted. Voluntary compliance will to some extent be a function of the relative costs of compliance and noncompliance as perceived by foreign investors. The expected cost of noncompliance can be viewed as the amount of the penalty imposed for failure to disclose the required information multiplied by the probability that the violation will be discovered and cleared by prosecution. Thus, for any given expected cost of compliance, as measured by the time and expense required to satisfy registration requirements, the Federal agency responsible for enforcing the registration law can increase the rate of compliance by increasing either the severity of the penalty or the amount of time devoted to detection and prosecution of violations. Of course, as more time and expenses are devoted to enforcement, so that the probability of conviction increases, a passive intelligence system gradually will evolve into an active system. Therefore, since this section is concerned primarily with the feasibility of a passive system, the following discussion considers only the role of the penalty itself. It focuses on the factors that determine the type and severity of penalties that are most feasible, given the reliance that is placed on penalties as the primary means of inducing compliance under the passive intelligence system.

*/ This section was prepared by Donald Baron.

Penalties can be classified as either prison sentences or monetary sanctions. The former usually are labeled as "criminal" punishments, whereas the latter usually are labeled as "civil" sanctions for enforcement purposes. Economists like to assume that potential offenders compare criminal and civil penalties by converting the former into a monetary value which roughly equals the value of the time they lose during their prison terms. Moreover, for any given offender, and for any given money penalty, there exists a prison sentence which will have the same deterrent effect on that offender. 107/ Economists also believe, however, that the money penalty can almost always achieve a given level of deterrence at a lower cost to society than can the comparable prison sentence. The former should therefore always be used whenever feasible.

The main reason for this difference in enforcement costs is that prison sentences, unlike money penalties, require large expenditures for the operation of prison facilities and for parole and probation services. Ten years ago, Becker estimated that about $1 billion was allocated annually to the enforcement of criminal punishment in the United States. 108/

Enforcement costs also are likely to be higher for criminal than for civil penalties because of the difference between criminal and civil procedures in the courts. Criminal defendants enjoy a number of constitutional rights that normally are not extended to civil defendants. 109/ Perhaps the most significant of these is the sixth amendment right to a determination by a jury of the facts upon which an alleged offense is based. This right applies in all criminal cases except prosecutions of very minor offenses. On the other hand, courts have long recognized that Congress may authorize administrative agencies, such as the Department of Agriculture, to hold quasi-judicial hearings to determine the facts in civil cases, 110/ and even to determine the amount of any penalty, so long as guidelines set by Congress are followed. 111/ Moreover, the sixth amendment does not require Congress to make the administrative agency's factual determinations subject to judicial review before a jury or trial court judge. It requires only that the civil defendant be afforded the same right to appeal an adverse administrative decision as the criminal defendant has to appeal an adverse trial court decision. In both cases, the appellate court will reverse only if it believes that the evidence is so insufficient that it cannot reasonably support the lower tribunal's decision. 112/

107/ Id. at 180.

108/ Becker, Crime and Punishment: An Economic Approach, 76(2), J. Pol. Econ. 169, 179 (March/April, 1968).

109/ Charney, The Need for Constitutional Protections for Defendants in Civil Penalty Cases, 59 Cornell L. Rev. 478, 483-85 (1974); Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379, 382-83 (1976).

110/ Charney, supra note 109, at 483-84.

111/ Frank Irey, Jr., Inc. v. Occupational Safety and Health Review Comm., 519 F. 2d 1200, 1204-15 (3d Cir. 1975).

112/ Charney, supra note 109, at 491-93.

An administrative tribunal concerned solely with the prosecution of a limited number of civil violations that come under its jurisdiction generally can be expected to adjudicate a case much more quickly than can the ordinary trial courts, which must adjudicate a much larger number and variety of both criminal and civil cases. Therefore, an administrative agency seeking to impose a civil "money" penalty on a foreign investor for failure to register landholdings should be able to prosecute its case at a much lower cost than could a trial court that seeks to impose a criminal penalty on that investor. 113/ Other factors favoring the administrative proceeding will further augment this savings. Consider, for example, the prosecution's burden of proof. While the due process clauses of the fifth and fourteenth amendments require proof of the criminal defendant's guilt beyond a reasonable doubt, they require proof of the civil defendant's guilt only by a preponderance of the evidence. 114/ The latter generally is a much easier burden to satisfy and may therefore result in a shorter and less expensive trial proceeding. In addition, the civil defendant, unlike the criminal defendant, enjoys no sixth amendment right to confront prosecution witnesses. 115/ The prosecution in the civil case may therefore save time and expense by relying on the depositions of witnesses who would otherwise have to be brought to the trial proceedings in a criminal case.

All of these points clearly suggest that an administrative agency authorized to prosecute foreign investors for violation of registration requirements and to impose "civil" monetary penalties for noncompliance will be the most efficient enforcement mechanism for a passive intelligence system of monitoring foreign investment. This, of course, raises the issue of how to determine the exact dollar amount of the penalty. A possible answer is that, at the very least, penalties should be large enough so that their expected values (the probability of conviction multiplied by the amount of the penalty) will exceed the cost of compliance with the registration requirements. Suppose, for example, that the average cost of compliance for all foreign investors is $1,000, while the probability of conviction for noncompliance is only 0.10. The penalty amount in this case would then have to be greater than $10,000, so that the probability of a penalty would be greater than $1,000.

Of course, a penalty of just over $10,000 would fail to deter those investors whose cost of compliance greatly exceeds the average cost. Moreover, the greater the variation of compliance costs among all foreign investors for any given average cost, the greater will be the number of these undeterred investors. Therefore, if 100-percent compliance is to be

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113/ If Congress does decide to impose a "civil" monetary penalty, as opposed to a criminal penalty, in order to minimize enforcement costs, it should at some point in the registration statute specifically refer to the penalty as a "civil" sanction. This will ensure that the courts always will view the penalty as a civil sanction when deciding whether a defendant has the right to a jury trial, or any other constitutional right that is usually applicable only in "criminal" cases. See Clark, supra note 109 at 411.

114/ Charney, supra note 109, at 487.

115/ Id. at 485.

achieved, the penalty would have to be set at such a high level that even the investor with the highest compliance cost would perceive an expected penalty that exceeds such cost. Suppose, for example, that an investor who owns a large number of property interests has a compliance cost of $5,000, compared with the average cost of $1,000. Given a probability of conviction of only 0.10, this investor would be deterred from noncompliance only by a penalty of over $50,000.

To be sure, such a large penalty clearly would be much higher than that necessary to deter the average investor. Thus, an arguably better solution might be a system under which the agency administering the law would impose penalties only on a case-by-case basis. That is, for each individual violation, the agency would ascertain the cost of compliance for the noncomplying investor, and then set the penalty accordingly. The smaller the cost of compliance, the smaller would be the penalty. The determination of compliance costs for the case of each prosecuted violation would, however, require a significant amount of agency time and expense. To minimize enforcement costs, a single statutory penalty set high enough to deter even those investors who face much higher than average compliance costs, but imposed on all violators regardless of compliance costs, would therefore clearly be preferable.

But while administrative efficiency might require a single large penalty imposed on all violators, those violators whose compliance costs are much less than those upon which the penalty is based may challenge the penalty on grounds that it is unconstitutionally excessive; that is, they may claim that the penalty is so excessive that it violates either their fourteenth and fifth amendment rights to due process of law, or their eighth amendment right not to be subjected to cruel and unusual punishment. In reviewing both of these claims, courts generally begin with the presumption that the full amount of a statutory penalty must be enforced unless the defendant challenging it can prove that it is "flagrantly oppressive" and so totally "disproportionate to the offense committed as to ... violate the judgment of reasonable people ...." 116/ Courts rarely have gone further to specify how a defendant might be able to satisfy these criteria. Therefore, it is not surprising that defendants very rarely have upheld their burden of proof, and that statutory penalties nearly always are enforced by the courts.

116/ Walton v. Scott, 247 Ark. 268, 269, 445 S.W. 2d 97, 98 (1969); Ex parte Brady, 70 Ark. 376, 68 S.W. 34 (1902). See also Anguiano v. Jim Walter Homes, Inc., 561 S.W. 2d 249, 254-55 (Texas Ct. App. 1978) (court rejected defendant's claim that penalty constituted cruel and unusual punishment); Wolff v. Fox, 137 Cal. Rptr. 258, 262 (Ct. App. 1977); Dept. of Social Welfare v. Gardiner, 94 Cal. App. 2d 431, 433, 210 P. 2d 855 (1949); Shaly v. Union School Dist., 58 Cal. App. 2d 599, 606, 137 P. 2d 762 (1943).

In Walton v. Scott, 117/ however, the Arkansas Supreme Court did establish a four-part test that may be representative of the attitudes of all courts concerning the type of evidence that a defendant must produce to invalidate a penalty. The Walton court stated that a penalty will be invalidated if the defendant produces evidence to show one or more of the following:

1. A milder penalty would be just as effective as a deterrant.
2. Administrative expenses required in enforcement and prosecution of violations of the statute are disproportionately small, compared with the amount of the penalty.
3. Similar statutes in other States impose much smaller penalties.
4. Violation of the statute causes damages to society that are disproportionately small, compared with the amount of the penalty. 118/

The defendant in Walton argued that a penalty of $22,350 imposed for failure to pay a cigarette tax of only $71.52 was so excessive as to violate his right to due process of law. The defendant failed, however, to introduce evidence to satisfy any of the above four-part test. Therefore, the court rejected his claim and ordered that he pay the full statutory penalty. 119/

The Walton decision clearly demonstrates the great reluctance of courts to invalidate statutory penalties no matter how large they may appear to be in relation to the offense committed. The $22,350 penalty imposed on the Walton defendant was over 300 times greater than the defendant's cost of compliance, which can be approximated as the $71.52 cigarette tax. Despite this disparity, the court refused to hold that the penalty was unconstitutionally excessive in the absence of any evidence presented by the defendant to support such a conclusion.

For this reason, the Walton decision supports the proposal suggested earlier that a law requiring registration of interests in property by foreign investors should impose a single large penalty on all offenders. This penalty should be high enough so that its expected value (the amount multiplied by the probability of conviction) will exceed the highest possible compliance cost that any foreign investor might face. For each prosecuted violation, the burden will be on the defendant-investor to prove that the statutory penalty is unconstitutionally excessive given his particular circumstances. Thus, an investor who can show that his own compliance costs are much less than those upon which the penalty is based might expect to achieve some reduction in the statutory amount. However, since there always is a risk that the court will reject a defendant's request for a reduction, the single large statutory penalty should still have a strong deterrent effect on all investors. Moreover, the agency administering the statute will be able to enforce it at a minimum cost. The agency can avoid the time and expense that would otherwise be required to determine a different penalty for each individual case it prosecutes, for it can simply rely on the court to make such a case-by-case determination based on whatever mitigating evidence the defendant may produce.

117/ 247 Ark. 626, 445 S.W. 2d 97 (1969).
118/ 445 S.W. 2d at 98.
119/ Id.

If Congress does decide to establish a single large statutory penalty based on the highest compliance cost that any single investor might face, a decision as to the exact level of such a penalty will require an estimation of the range of compliance costs that are likely to be required to satisfy Federal registration requirements. As noted earlier, compliance costs can be expected to increase as the number of property interests held by the foreign investor increases. Therefore, it may be useful to study data from the registration statements that will be filed by foreign investors pursuant to the Agricultural Foreign Investment Disclosure Act of 1978 120/ recently passed by Congress. Those investors who register a much larger than average number of property interests under this Act could be interviewed to determine their respective registration costs. These costs would then establish the minimum value of a single statutory penalty that would be sufficient to deter noncompliance by all foreigners.

The Bureau of Economic Analysis (BEA) of the U.S. Department of Commerce has had extensive experience in administering programs which require the reporting of foreign direct investment in the United States. 121/ Prior to 1978, most of the reporting was done without the threat of civil or criminal sanctions. 122/ The BEA has found that the vast majority of foreign investors are earnestly concerned about complying with the reporting requirements. This was true even before the penalty provisions were instituted in 1978. They feel that there is no need for increased penalties, as they believe they are getting complete compliance under the present penalties.

The reporting requirements which the BEA administers place an affirmative burden on foreign investors. If they are required by law to report, they must do so regardless of whether the BEA has contacted them or provided them with the necessary forms. The BEA, however, makes a concerted effort to identify and contact all investors who possibly may be required to report. The BEA staff checks with, among others, Chambers of Commerce, accounting firms, and embassies, and reviews business and trade periodicals and other possible sources, to identify such investors. They believe that this system is highly successful, and that there is no widespread evasion of the reporting requirements. Indeed, they have detected no instances of attempted evasion of the reporting requirements.

120/ Pub. L. No. 95-460 (1978) (to be codified as 7 U.S.C. §§3501-3508).

121/ This material is based on an interview by Rolland Morse with James Bomkamp, Chief, Foreign Direct Investment in the United States, International Investment Division, Bureau of Economic Analysis, June 29, 1979.

BEA conducted a benchmark survey under the Foreign Investment Study Act of 1974, 15 U.S.C. §78b (1974). BEA currently is gathering information on foreign direct investment under the International Investment Survey Act of 1976, 22 U.S.C. §§3101-3108 (1976).

122/ Penalty provisions (not more than a $10,000 fine and/or imprisonment for not more than 1 year) were first instituted for the benchmark survey under the Foreign Investment Study Act of 1974, 15 U.S.C. §78b (1974). In 1978, the provisions of the International Investment Survey Act of 1976 were implemented. It also carried a penalty of not more than a $10,000 fine and/or imprisonment for not more than 1 year. 22 U.S.C. §3105 (1976).

As a result of this apparently successful compliance record, the BEA has had limited experience with enforcement of these reporting requirements. Typically, for each reporting requirement, there have been one or two recalcitrant investors who felt they were not required to report under the law. The BEA, which usually disagrees, responds by some prodding through its General Counsel's Office. They have not yet needed to resort to an actual prosecution.

It is important to note that, by statute, 123/ the BEA is forbidden to disclose the information it collects to the public. In contrast, AFIDA requires all reported information to be placed on public display. If AFIDA, or another future reporting system, were to effectively require the public disclosure of the beneficial ownership of foreign-owned U.S. real estate, the likelihood that some investors will elect not to report greatly increases. In those countries where sanctions for the removal of capital are greater than the sanctions imposed in this country for failure to report, the investor may elect not to report.

123/ 22 U.S.C. §3104(c) (1976).

APPENDIX */

Major Provisions of Treaties Affecting Right of Aliens to Own Real Estate

Following is a list of Friendship, Commerce, and Navigation treaties and other similar treaties to which the United States has become a party and which are carried on the records of the Department of State as being in force in whole or in part on January 1, 1978. Included are those treaties and other agreements which on that date had not expired by their terms or had not been denounced by the parties, replaced, or superseded by other agreements, or otherwise definitely terminated.

References

Stat.	U.S. Statutes at Large.
U.S.T.	U.S. Treaties and Other International Agreements (volumes published on a calendar-year basis beginning January 1, 1950).
T.S.	Treaty Series, issued singly in pamphlets by the Department of State (until replaced in 1945 by the T.I.A.S.).
T.I.A.S.	Treaties and Other International Acts Series, issued singly in pamphlets by the Department of State.
E.A.S.	Executive Agreement Series (replaced in 1945 by T.I.A.S.).

Argentina

Treaty of Friendship, Commerce, and Navigation, July 27, 1853, 10 Stat. 1005, T.S. No. 4.

Austria

Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, 47 Stat. 1876, T.S. No. 838.

Provisions protecting aliens.--Austrians shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing, and commercial work of every kind without interference, to carry on every form of commercial activity which is not forbidden by the local law. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

*/ This Appendix was prepared by Donna Ralston.

Special provisions relating to land.--As regards the acquisition, possession, and disposition of immovable property, except as regards the leasing of land for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes, Austrians shall be accorded the treatment generally accorded to foreigners by the laws of the place where the property is situated. (Art. 1, para. 3.)

Austrians shall be accorded national treatment with respect to owning, erecting, or leasing and occupying appropriate buildings and with respect to leasing lands for treaty-protected purposes. (Art. 1, para. 2.)

If Austrian nationals inherit real or other immoveable property or interests in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property, this term to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Austrians shall enjoy within the United States, reciprocally and upon compliance with the conditions there imposed, national treatment with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain. (Art. 10, para. 2.)

Belgium

Treaty of Friendship, Establishment, and Navigation, February 21, 1961, 14 U.S.T. 1284, T.I.A.S. No. 5432.

Provisions relating to aliens.--Nationals and companies of Belgium shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other activities for gain within the United States. (Art. 6, para. 2.)

Belgian enterprises, whether in the form of individual proprietorships, companies, or otherwise, situated in the United States shall be accorded national treatment in all that relates to the conduct of their activities. (Art. 6, para. 4.)

Note.--The provisions of Article 6, paragraph 2, shall be constructed to confer rights with respect to owning real property. (Protocol, section 10.)

Special provisions relating to land.--The United States reserves the right to determine the extent to which Belgians may establish, acquire interests in, or carry on enterprises engaged in the exploitation of land or other natural resources. However, new limitations imposed by the United States on the extent to which Belgians are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are regularly engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by Belgian nationals and companies. (Art. 6, para. 5.)

Bolivia

Treaty of Peace, Friendship, Commerce, and Navigation, May 13, 1858, 12 Stat. 1003, T.S. No. 32.

Special provisions relating to land.--If Bolivian nationals inherit real estate in the United States but are prevented from possessing it because of alienage, they shall be allowed the longest period allowed by the law to dispose of the real estate. (Art. 12.)

Brazil

Treaty of Peace, Friendship, Commerce, and Navigation, December 12, 1828, 8 Stat. 390, T.S. No. 34. (Articles relating to commerce and navigation terminated December 12, 1841.)

Special provisions relating to land.--If Brazilian nationals inherit real estate in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years to dispose of it, as they may think proper. (Art. 11.)

Brunei

Treaty of Peace, Friendship, Commerce, and Navigation, June 23, 1850, 10 Stat. 909, T.S. No. 33.

Chile

Treaty of Peace, Amity, Commerce, and Navigation, May 16, 1832, 8 Stat. 434, T.S. No. 40. (Articles relating to commerce and navigation terminated January 20, 1850.)

Special provisions relating to land.--If Chilean nationals inherit real estate in the United States but are prevented from holding it because of alienage, they shall be allowed a term of 3 years in which to dispose of the real estate. (Art. 9.)

China

Treaty of Friendship, Commerce, and Navigation, November 4, 1946, 63 Stat. 1299, T.I.A.S. No. 1871.

Provisions protecting aliens.--Chinese nationals, corporations, and associations shall be permitted, without interference, to engage in and to carry on commercial, manufacturing, processing, scientific, educational, religious, and philanthropic activities not forbidden by law. They also shall be accorded national treatment and most-favored-nation treatment with respect

to the doing of anything incidental to or necessary for the enjoyment of the foregoing privileges; and to exercise all of these rights and privileges in conformity with the applicable laws and regulations, if any, which are or may hereafter be enforced by the duly constituted authorities.

Special provisions relating to land.--Chinese nationals, corporations, and associations may acquire, hold, erect, or lease and occupy appropriate buildings in the United States for engaging in commercial, manufacturing, processing, scientific, educational, religious, philanthropic, and professional activities. In addition, they may lease appropriate lands for residential, commercial, manufacturing, processing, professional, scientific, educational, religious, philanthropic, and mortuary purposes. They also shall be accorded national treatment and most-favored-nation treatment in respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing rights and privileges; and to exercise all these rights and privileges in conformity with the applicable laws and regulations, if any, which are or may hereafter be enforced by the duly constituted authorities.

Chinese nationals, corporations, or associations may be accorded rights in respect of exploration for and exploitation of mineral resources in conformity with the applicable laws and regulations, if any, which are or may hereafter be enforced by the duly constituted authorities.

If Chinese nationals are prevented by local laws and regulations from inheriting real or other immoveable property, they shall be allowed a term of 3 years in which to dispose of it, this term to be reasonably prolonged if circumstances render it necessary. (Art. 8, para. 2.)

Chinese nationals, corporations, or associations shall be permitted to acquire, hold, and dispose of real or other immoveable property subject to conditions and requirements as prescribed by U.S. laws. This treatment shall be no less favorable than that accorded to nationals, corporations, and associations of any third country. These provisions do not apply if a State, territory, or possession does not permit foreigners to acquire, hold, and dispose of land upon the same terms as U.S. nationals, corporations, and associations. (Art. 8, para. 1.)

Colombia

Treaty of Peace, Amity, Navigation, and Commerce, December 12, 1846, 9 Stat. 881, T.S. No. 54.

Special provisions relating to land.--Colombians are accorded the power to dispose of their real estate within the United States by sale, donation, testament, or otherwise. Colombians may inherit real estate, either by testament or intestacy, and may take possession or dispose of it at will. (Art. 12.)

Costa Rica

Treaty of Friendship, Commerce, and Navigation, July 10, 1851, 10 Stat. 916, T.S. No. 62.

Denmark

Treaty of Friendship, Commerce, and Navigation, October 1, 1951, 12 U.S.T. 908, T.I.A.S. No. 4797.

Provisions protecting aliens.--Danes and Danish companies shall be accorded most-favored-nation treatment with respect to exploring for and exploiting mineral deposits. (Art. 7, para. 2.)

Danish nationals and companies shall be accorded, within the United States, national treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, educational, religious, and philanthropic activities. (Art. 7, para. 1.)

Special provisions relating to land.--Danes and Danish companies shall be accorded national treatment with respect to inheriting land by testate or intestate succession, but may be required by local law to dispose of it. A term of at least 5 years shall be allowed in which to effect such disposition. (Art. 9, paras. 1 and 4.)

Danes and Danish companies shall be accorded, with respect to acquiring land, the treatment generally accorded to foreigners under the laws of the situs of the land. They are specifically permitted to hold land necessary to engage in their treaty-protected activities, in conformity with the applicable laws and regulations. (Art. 9, para. 3.)

Ecuador

Treaty of Peace, Friendship, Navigation, and Commerce, June 13, 1839, 8 Stat. 534, T.S. No. 76. (Articles relating to commerce and navigation terminated August 25, 1892.)

Special provisions relating to land.--If Ecuadorian nationals inherit real estate in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to dispose of it. (Art. 12.)

Estonia

Treaty of Friendship, Commerce, and Consular Rights, December 23, 1925, 44 Stat. 2379, T.S. No. 736.

Provisions protecting aliens.--Estonians shall be permitted to engage in scientific, religious, philanthropic, manufacturing, and commercial work of every kind without interference; and to carry on every form of commercial activity which is not forbidden by the local law. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

Special provisions relating to land.--Estonians are specifically permitted to own, erect, or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes. They shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

If Estonian nationals inherit real or other immoveable property in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Estonians shall be accorded, reciprocally and upon compliance with conditions there imposed, national treatment with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the United States. The United States shall not, however, be required to grant any application for mining rights or privileges if, at the time such application is presented, the granting of all similar applications has been suspended or discontinued. (Art. 13, para. 2.)

Ethiopia

Treaty of Amity and Economic Relations, September 7, 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864.

Special provisions relating to land.--Ethopians and Ethopian companies are to be accorded most-favored-nation treatment respecting the leasing, for suitable periods of time, real property needed for their residences or for the conduct of treaty-protected activities, and respecting the disposition of property of all kinds acquired by sale, testament, or otherwise. The ownership of real property within the United States by Ethiopians and Ethiopian companies shall be subject to the applicable laws therein. (Art. 9, para. 1.)

Federal Republic of Germany

Treaty of Friendship, Commerce, and Navigation, October 29, 1954, 7 U.S.T 1839, T.I.A.S. No. 3593.

Provisions Protecting Aliens.--German nationals and companies, within the United States shall be accorded national treatment and most-favored-nation treatment with respect to engaging in all types of commercial, industrial, financial, and other activities for gain. (Art. 7, paras. 1 and 4.)

German nationals and companies shall be accorded, within the United States, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious, and philanthropic activities. (Art. 8, para. 2.)

Special Provisions Relating to Land.--The United States reserves the right to limit the extent to which Germans may establish, acquire interests in, or carry on enterprises engaged in the exploitation of land or other natural resources. However, new limitations imposed by the United States upon the extent to which Germans are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by German nationals and companies. (Art. 7, para. 2.)

German nationals and companies shall be accorded national treatment with respect to leasing land, buildings, and other real property appropriate to the conduct of treaty-protected activities and for residential purposes, and with respect to occupying and using such property. German nationals and companies shall be accorded other rights in real property permitted by the applicable U.S. laws. (Art. 9, para. 1.)

German nationals and companies shall be accorded, within the United States, national treatment and most-favored-nation treatment with respect to disposing of property of all kinds. (Art. 9, para. 4.)

German nationals and companies shall be accorded national treatment with respect to acquiring property of all kinds within the United States by testate or intestate succession or under judicial sale to satisfy valid claims. Should they, because of their alienage, be ineligible to continue to own any such property, they are specifically allowed a term of at least 5 years in which to dispose of it. (Art. 9, para. 3.)

Note.--For some purposes, the Treaty of Friendship, Commerce, and Consular Rights of December 8, 1923, is still in force, as amended June 3, 1953. See 44 Stat. 2132, T.S. No. 725, for the text of the treaty, and 5 U.S.T. 1939, T.I.A.S. No. 3062, for the amendments.

Finland

Treaty of Friendship, Commerce, and Consular Rights, February 13, 1934, 49 Stat. 2659, T.S. No. 868.

Provisions protecting aliens.--Finnish nationals shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing, and commercial work of every kind, and to carry on every form of commercial activity. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, upon the same terms as nationals of the State of residence insofar as may be permitted by local law. (Art. 1, para. 2.)

Special provisions relating to land.--Finnish nationals are specifically permitted to own, erect, or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes. They shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of the foregoing privileges, upon the same terms as nationals of the State of residence insofar as may be permitted by local law. (Art. 1, para. 2.)

If Finnish nationals inherit real or other immoveable property in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Finnish nationals shall be accorded, reciprocally and upon compliance with the conditions there imposed, national treatment with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the United States. The United States shall not, however, be required to grant any application for mining rights or privileges if, at the time such application is presented, the granting of all similar applications has been suspended or discontinued. (Art. 17, para. 2.)

The Finnish Government shall have the right to acquire and own land and buildings required for diplomatic or consular premises in the United States and also to erect buildings in such territory for the purposes stated, subject to local building regulations. (Art. 21, para. 2.)

France

Convention of Establishment, Protocol, and Declaration, November 25, 1959, 11 U.S.T. 2398, T.I.A.S. No. 4625.

Provisions protecting aliens.--French nationals and companies shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other activities for gain within the United States, whether directly or through the intermediary of an agent or of any other natural or juridical person. French-controlled enterprises shall be accorded national treatment in all that relates to the conduct of their activities. (Art. 5, para. 1.)

Special provisions relating to land.--The United States reserves the right to determine the extent to which French nationals may, within its territories, create, control, manage, or acquire interests in enterprises engaged in the exploitation of the soil or other natural resources. (Art. 5, para. 2.)

French nationals and companies shall be accorded national treatment with respect to leasing, utilizing, and occupying all kinds of real property appropriate to the exercise of their convention-protected activities. French nationals and companies also shall be accorded, as regards the acquisition and possession of real property, all other rights to which aliens and alien companies are entitled under U.S. legislation, with the United States reserving the right to invoke reciprocity in this respect. (Art. 7, para. 1.)

French nationals and companies shall be accorded within the United States national treatment with respect to disposing of property of all kinds. (Art. 7, para. 3.)

If a French national or company inherits real property in the United States but is disqualified from holding it because of alienage, they shall be allowed a term of at least 5 years in which to dispose of the real property. (Protocol, para. 11.)

Other special provisions.--The United States may deny the benefits of the convention to any French company in which nationals of a third nation have a direct or indirect controlling interest, except with respect to recognition of juridical status and access to the courts. (Art. 13.)

Greece

Treaty of Friendship, Commerce, and Navigation, August 3, 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057.

Provisions protecting aliens.--Greek nationals and companies shall be accorded within the United States national treatment and most-favored-nation treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, philanthropic, and professional activities, except the practice of law, dentistry, and pharmacy. (Art. 12, para. 1.)

Special provisions relating to land.--Greek nationals and companies shall be accorded national treatment with respect to acquiring by purchase or otherwise and with respect to owning, leasing, occupying, and using land, buildings, and other immoveable property appropriate to the conduct of

treaty-protected activities, and for residential and mortuary purposes. However, the acquisition by purchase, or otherwise, of ownership rights in land, buildings, and other immoveable property by Greek nationals and companies shall be dependent upon the applicable laws of the States, territories, and possessions of the United States within which such property is located. [Art. 9, para. 1(a).]

If a Greek national or company inherits property in the United States but is disqualified from holding it because of alienage, they shall be allowed a term of at least 5 years in which to dispose of such property. (Art. 9, para. 2.)

Nationals and companies of Greece shall be accorded national treatment with respect to disposing of real property within the United States. (Art. 9, para. 3.)

Greek nationals and companies shall be accorded most-favored-nation treatment with respect to exploring for and exploiting mineral deposits. [Art. 12, para. 2(a).]

Honduras

Treaty of Friendship, Commerce, and Consular Rights, December 7, 1927, 45 Stat. 2618, T.S. No. 764.

Provisions protecting aliens.--Hondurans shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing, and commercial work of every kind without interference; and to carry on every form of commercial activity which is not forbidden by local law. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

Special provisions relating to land.--The nationals of Honduras are specifically permitted to own, erect, or lease and occupy apartment buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

If Honduran nationals inherit real or other immoveable property or interests in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

The nationals of Honduras shall enjoy, reciprocally and upon compliance with the conditions there imposed, national treatment with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the United States. (Art. 14, para. 2.)

Iran

Treaty of Amity, Economic Relations, and Consular Rights, August 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

Provisions protecting aliens.--Iranians within the United States shall, either individually or through associations, and so long as their activities are not contrary to public order, safety, or morals, be permitted to engage in philanthropic, educational, and scientific activities. (Art. 2, para. 2.)

Iranian enterprises permitted to be established or acquired within the United States shall be accorded national treatment in the conduct of their activities. (Art. 4, para. 4.)

Special provisions relating to land.--Iranian nationals and companies shall be accorded national and most-favored-nation treatment with respect to leasing, for suitable periods of time, real property needed for their residence or for the conduct of treaty-protected activities; and disposing of property of all kinds by sale, testament, or otherwise. (Art. 5, para. 1.)

The Iranian Government may acquire, own, lease for any period of time, or otherwise hold and occupy, such lands, buildings, and appurtenances as may be necessary and appropriate for governmental, other than military, purposes. If under the local law the permission of the local authorities must be obtained as a prerequisite to any such acquiring or holding, such permission shall be given on request. (Art. 15, para. 1.)

Ireland

Treaty of Friendship, Commerce, and Navigation, January 21, 1950, 1 U.S.T. 785, T.I.A.S. No. 2155.

Provisions protecting aliens.--Irish nationals and companies are to be accorded national treatment and most-favored-nation treatment respecting commercial, manufacturing, processing, financial, publishing, scientific, educational, religious, and philanthropic activities and the practice of law. [Art. 6, paras. 1(a) and 3(a).]

Irish nationals and companies also are to be accorded most-favored-nation treatment with respect to engaging in the practice of law and in the fields of economic and cultural activities. [Art. 6, para. 3(b).]

Special provisions relating to land.--Irish nationals and companies shall be accorded national treatment with respect to acquiring all kinds of property within the United States by testate or intestate succession or through judicial process. Should they, because of their alienage, be ineligible to continue to own any such property, they shall be allowed a reasonable period in which to dispose of it, in a normal manner, at its market value. (Art. 7, para. 1.)

Except as provided in Article 7, paragraph 1, the ownership of real property within the United States by Irish nationals and companies shall be subject to the applicable laws therein. They shall, however, be permitted to possess and occupy real property within the United States, incidental to or necessary for the enjoyment of treaty-protected rights. (Art. 7, para. 3.)

Note.--The provisions of Article 6, paragraph 3(b), shall not apply to mining activities. (Protocol, §6.)

Israel

Treaty of Friendship, Commerce, and Navigation, August 23, 1951, 5 U.S.T. 550, T.I.A.S. No. 2948.

Provisions protecting aliens.--Israeli nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in all types of commercial, industrial, financial, and other activity for profit (business activities) within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 7, paras. 1 and 4.)

Israeli nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious, and philanthropic activities within the United States. (Art. 8, para. 3.)

Special provisions relating to land.--Nationals and companies of Israel shall be accorded, within the United States, national treatment with respect to leasing land, buildings, and other immoveable property appropriate to the conduct of treaty-protected activities and for residential and mortuary purposes and with respect to occupying and using such property. They also shall be accorded other rights in immoveable property permitted by the applicable laws of the States, territories, and possessions of the United States. [Art. 9, paras. 1(a), (b).]

If a national or company of Israel inherits property in the United States but is disqualified from holding it because of alienage, they shall be permitted a term of at least 5 years in which to freely dispose of the property. (Art. 9, para. 4.)

Israeli nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to disposing of property of all kinds within the United States. (Art. 9, para. 5.)

The United States reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged in the exploitation of land or other natural resources. (Art. 7, para. 2.)

Note.--The provisions of Article 9 do not affect the disposition by the United States of its public domain. (Protocol, §5.)

Italy

Treaty of Friendship, Commerce, and Navigation, February 2, 1948, 63 Stat. 2255, T.I.A.S. No. 1965.

Provisions protecting aliens.--Italian nationals, corporations, and associations shall be accorded national treatment and most-favored-nation treatment with respect to engaging in commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic, and professional activities, except the practice of law, and shall be permitted to do anything incidental to or necessary for the enjoyment of any of the foregoing rights and privileges, in conformity with the applicable laws and duly established regulations. (Art. 1, paras. 2(a), (d), and 3; Art. 2, paras. 3 and 4.)

Special provisions relating to land.--Italian nationals, corporations, and associations shall be accorded national and most-favored-nation treatment with respect to acquiring, owning, erecting or leasing, and occupying appropriate buildings, and with respect to leasing appropriate lands, for treaty-protected residential and mortuary purposes, and shall be permitted to do anything incidental to or necessary for the enjoyment of any of the foregoing rights and privileges, in conformity with the applicable laws and duly established regulations. (Art. 1, paras. 2(b), (d), and 3; Art. 2, paras. 3 and 4.)

Italian nationals, corporations, and associations shall be accorded most-favored-nation treatment with the United States with respect to exploration for and exploitation of mineral resources. (Art. 4.)

Italian nationals, corporations, and associations shall be permitted to acquire, own, and dispose of immoveable property or interests therein within the United States, subject to laws and regulations which are or may hereafter be in force within the State, territory, or possession of the situs of the property. [Art. 7, para. 1(a).]

If an Italian national, corporation, or association inherits immoveable property in the United States but is disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell or otherwise dispose of the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 7, para. 2.)

Japan

Treaty of Friendship, Commerce, and Navigation, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

Provisions protecting aliens.--Japanese nationals and companies shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other business activities within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 7, para. 1.)

Japanese nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious, and philanthropic activities within the United States. (Art. 8, para. 3.)

Special provisions relating to land.--The United States reserves the right to limit the extent to which Japanese may establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in the exploitation of land or other natural resources. (Art. 7, para. 2.)

Japanese nationals and companies shall be accorded national treatment with respect to leasing land, buildings, and other immoveable property appropriate to the conduct of treaty-protected activities and for residential purposes, but may be restricted in other rights in immoveable property by the applicable laws of the United States. (Art. 9, para. 1.)

If a Japanese national or company inherits property within the United States, but because of alienage is disqualified from holding it, they shall be permitted a term of at least 5 years in which to freely dispose of it. (Art. 9, para. 3.)

Japanese nationals and companies shall be accorded within the United States national treatment and most-favored-nation treatment with respect to disposing of property of all kinds. (Art. 9, para. 4.)

Korea

Treaty of Friendship, Commerce, and Navigation, November 28, 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947.

Provisions protecting aliens.--Korean nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in all types of commercial, industrial, financial, and business activities within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 7, paras. 1 and 4.)

Special provisions relating to land.--The United States reserves the right to limit the extent to which Koreans may establish, acquire interests in, or carry on enterprises engaged within its territories in the exploitation of land or other natural resources. (Art. 7, para. 2.)

Korean nationals and companies shall be accorded national treatment with respect to leasing land, buildings, and other immoveable property appropriate to the conduct of treaty-protected activities and for residential purposes, but may be restricted in other rights in immoveable property by the applicable laws of the United States. (Art. 9, para. 1.)

If a national or company of Korea inherits property in the United States but is disqualified from holding it because of alienage, they shall be permitted a term of at least 5 years in which to dispose of it. (Art. 9, para. 3.)

Korean nationals and companies shall be accorded within the United States national treatment and most-favored-nation treatment with respect to disposing of property of all kinds. (Art. 9, para. 4.)

Note.--With reference to Article 7, paragraph 4, it is understood that the United States is not obligated to accord most-favored-nation treatment regarding rights to engage in mining on the public domain, other than on a basis of reciprocity. (Protocol, §6 .)

Latvia

Treaty of Friendship, Commerce, and Consular Rights, April 20, 1928, 45 Stat. 2641, T.S. No. 765.

Provisions protecting aliens.--Latvians shall be permitted to engage in scientific, religious, philanthropic, and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by local law; and to engage in every trade, vocation, manufacturing industry, and profession not reserved exclusively to nationals of the country. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

Special provisions relating to land.--Latvian nationals shall be permitted to own, erect, or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes, and generally to do anything incidental to or necessary for the enjoyment of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the Nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

If Latvian nationals inherit real or other immoveable property or interests in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the real property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Latvian nationals shall enjoy, reciprocally and upon compliance with the conditions there imposed within the United States, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain. (Art. 14, para. 2.)

Liberia

Treaty of Friendship, Commerce, and Navigation, August 8, 1938, 54 Stat. 1739, T.S. No. 956.

Provisions protecting aliens.--Liberians shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing, and commercial work of every kind without interference; and to carry on every form of commercial activity which is not forbidden by national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

Special provisions relating to land.--Liberian nationals shall be permitted to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial, and mortuary purposes, and generally to do anything incidental to or necessary for the enjoyment of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the Nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

If Liberian nationals inherit real or other immoveable property or interests in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the real property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Liberian nationals, corporations, and associations shall enjoy in the United States most-favored-nation treatment with respect to exploration for or exploitation of mineral resources, provided that the United States shall not be required to grant rights and privileges with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain, or with respect to the ownership of stock in domestic corporations engaged in such operations, greater than U.S. nationals, corporations, and associations receive from Liberia. (Art. 19, para. 1.)

Luxembourg

Treaty of Friendship, Establishment, and Navigation, February 23, 1962, 14 U.S.T. 251, T.I.A.S. No. 5306.

Provisions protecting aliens.--Nationals and companies of Luxembourg shall be accorded national treatment with respect to engaging in scientific, educational, religious, and philanthropic activities within the United States. (Art. 6, para. 4.)

Nationals and companies of Luxembourg shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and business activities within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 6, para. 1.)

Special provisions relating to land.--The United States reserves the right to determine the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in the exploitation of land or other natural resources. (Art. 6, para. 2.)

Nationals and companies of Luxembourg shall be accorded within the United States national treatment with respect to leasing land, buildings, and other real property appropriate to the conduct of treaty-protected activities and for residential purposes; and with respect to other rights in real property permitted by the applicable U.S. laws. [Art. 9, paras. 1(a) and (b).]

Nationals and companies of Luxembourg shall be accorded national treatment within the United States with respect to acquiring property of all kinds by testate or intestate succession or through judicial process. Should they because of alienage be ineligible to continue to own any such property, they shall be allowed a period of at least 5 years in which to dispose of it. (Art. 9, para. 3.)

Nationals and companies of Luxembourg shall be accorded national treatment with respect to disposing of real property. (Art. 9, para. 4.)

Muscat and Oman

Treaty of Amity, Economic Relations, and Consular Rights, December 20, 1958, 11 U.S.T. 1835, T.I.A.S. No. 4530.

Provisions protecting aliens.--Nationals of Oman shall be accorded most-favored-nation treatment with respect to engaging in philanthropic, educational, and scientific activities. (Art. 2, para. 3.)

Nationals and companies of Oman shall be accorded national treatment with respect to establishing, as well as with respect to acquiring interests in, enterprises for engaging in commercial activities within the United States. Moreover, nationals and companies of Oman shall be accorded national treatment and most-favored-nation treatment with respect to establishing or acquiring interests in enterprises for engaging in industrial and other business activities within the United States. (Art. 5, para. 1.)

Special provisions relating to land.--Nationals and companies of Oman shall be accorded most-favored-nation treatment within the United States with respect to leasing real property needed for their residences and for the conduct of treaty-protected activities, and national treatment with respect to disposing of property of all kinds by sale, testament, or any other legal manner. (Art. 6, para. 1.)

The rights of Oman include the right to own, lease, or build buildings and appurtenances necessary for consular offices and staff residences. [Protocol, §9(a).]

Netherlands

Treaty of Friendship, Commerce, and Navigation, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942.

Provisions protecting aliens.--Dutch nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in all types of commercial, industrial, financial, and business activities within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 7, paras. 1 and 4.)

Dutch nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious, and philanthropic activities within the United States, and shall be accorded the right to form associations for that purpose under the laws of the United States. (Art. 8, para. 2.)

Special provisions relating to land.--The United States reserves the right to limit the extent to which Dutch citizens may establish, acquire interests in, or carry on enterprises engaged in the exploitation of land or other natural resources. (Art. 7, para. 2.)

Dutch nationals and companies shall be accorded within the United States national treatment with respect to leasing land, buildings, and other real property appropriate to the conduct of treaty-protected activities and for residential purposes, and with respect to occupying and using such property; and shall be accorded within the United States other rights in real property permitted by the applicable laws of the States, territories, and possessions of the United States. (Art. 9, para. 1.)

Dutch nationals and companies shall be accorded national treatment with respect to acquiring property of all kinds within the United States by testate or intestate succession or through judicial process. Should they because of alienage be ineligible to continue to own any such property, they shall be allowed a reasonable period in which to dispose of it. (Art. 9, para. 4.)

Dutch nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to disposing of real property within the United States. Dutch-controlled companies which are incorporated under U.S. laws are to be accorded national treatment and most-favored-nation treatment with respect to acquiring, owning, using, and disposing of property of all kinds within the United States. (Art. 9, para. 5.)

Note.--The first sentence of Article 7, paragraph 2, shall not apply to the establishment of, the acquisition of interests in, or the control, operation, and management of Dutch companies for engaging in the exploration for and exploitation of petroleum and other mineral resources within the United States.

Nicaragua

Treaty of Friendship, Commerce, and Navigation, January 21, 1956, 9 U.S.T. 449, T.I.A.S. No. 4024.

Provisions protecting aliens.--Nationals and companies of Nicaragua shall be accorded national treatment and most-favored-nation treatment with respect to engaging in all types of commercial, industrial, financial, and business activities within the United States, whether directly or by agent or through the medium of any form of lawful juridical entity. (Art. 7, paras. 1 and 4.)

Special provisions relating to land.--The United States reserves the right to limit the extent to which Nicaraguan citizens may establish, carry on, or acquire interests in enterprises engaged in the exploitation of land or other natural resources. (Art. 7, para. 2.)

Nationals and companies of Nicaragua shall be accorded within the United States national treatment with respect to leasing land, buildings, and other immoveable property appropriate to the conduct of treaty-protected activities and for residential purposes, and with respect to occupying and using such property; and shall be accorded within the United States other rights in immoveable property permitted by the applicable laws of the United States. [Art. 9, paras. 1(a) and (b).]

If Nicaraguan nationals or companies acquire property through testate or intestate succession but because of alienage are prevented from holding it, they shall be permitted a term of 5 years in which to freely dispose of the property. (Art. 9, para. 2.)

Nicaraguan nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to disposing of all kinds of property within the United States. (Art. 9, para. 5.)

Note.--With reference to Article 7, paragraph 4, the United States may require that rights to engage in mining on the public domain shall be dependent on reciprocity. (Protocol, §5.)

Norway

Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, 47 Stat. 2135, T.S. No. 852.

Provisions protecting aliens.--Norwegians shall be permitted to engage in professional, scientific, religious, philanthropic, manufacturing, and commercial work of every kind without interference; and to carry on every form of commercial activity which is not forbidden by the local law. They also shall be accorded national treatment and most-favored-nation treatment with respect to the doing of anything incidental to or necessary for the enjoyment of any of the foregoing privileges, submitting themselves to all local laws and regulations duly established. (Art. 1, para. 1.)

Special provisions relating to land.--If Norwegian nationals inherit real or other immoveable property or interests in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 4, para. 1.)

Norwegians shall enjoy, reciprocally and upon compliance with conditions therein imposed, national treatment with respect to the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain of the United States. (Art. 13, para. 2.)

Pakistan

Treaty of Friendship, Commerce, and Protocol, November 12, 1959, 12 U.S.T. 110, T.I.A.S. No. 4863.

Provisions protecting aliens.--Enterprises which nationals and companies of Pakistan are permitted to establish or acquire within the United States shall be accorded most-favored-nation treatment with respect to the conduct of their activities. Such nationals and companies shall enjoy the rights to continued control and management of such enterprises, and to do all other things necessary for or incidental to the effective conduct of their affairs. (Art. 7, para. 1.)

Special provisions relating to land.--Nationals and companies of Pakistan shall be accorded within the United States national treatment with respect to leasing land, buildings, and other real property appropriate to the conduct of treaty-protected activities and for residential purposes, and with respect to occupying and using such property; and shall be accorded within the United States other rights in real property permitted by the applicable laws of the United States. [Art. 9, paras. 1(a) and (b).]

If nationals or companies of Pakistan acquire property through testate or intestate succession but because of alienage are prevented from holding it, they shall be permitted a term of at least 5 years in which to dispose of it. [Art. 9, paras. 1(a) and (b).]

Pakistani nationals and companies shall be accorded national treatment and most-favored-nation treatment with respect to disposing of property of all kinds within the United States. (Art. 9, para. 4.)

Note.--With reference to Article 7, paragraph 2, the United States may require that rights to engage in mining on the public domain shall be dependent on reciprocity. (Protocol, §4.)

Paraguay

Treaty of Friendship, Commerce, and Navigation, February 4, 1859, 12 Stat. 1091, T.S. No. 272.

Saudi Arabia

Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation, November 7, 1933, 48 Stat. 1826, E.A.S. No. 53.

Provisions protecting aliens.--Saudi Arabians are entitled to be treated on a most-favored-nation basis with regard to their persons, property rights, and interests. (Art. 2.)

Spain

Treaty of Friendship and General Relations, July 3, 1902, 33 Stat. 2105, T.S. No. 422.

Special provisions relating to land.--If Spanish nationals inherit real property (or property not personal) in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years in which to sell the property. This term is to be reasonably prolonged if circumstances render it necessary. (Art. 3.)

Surinam

Treaty of Friendship, Commerce, and Navigation, March 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942 (applicable to Surinam.)

Switzerland

Treaty of Friendship, Commerce, and Extradition, November 25, 1850, 11 Stat. 587, T.S. No. 353.

Provisions protecting aliens.--Swiss citizens shall be accorded national treatment with respect to the exercise of their profession, industry, and commerce. (Art. 1, para. 1.)

Special provisions relating to land.--If Swiss nationals acquire or inherit real estate within a State but are disqualified by State law from holding it because of alienage, they shall be permitted to sell the property. (Art. 5, para. 3.)

Thailand

Treaty of Amity and Economic Relations, May 29, 1966, 19 U.S.T. 5843, T.I.A.S. No. 6540.

Provisions protecting aliens.--Nationals and companies of Thailand shall be accorded national treatment with respect to establishing and acquiring interests in enterprises engaged in commercial, industrial, financial, and other business activities within the United States. (Art. 4, para. 1.)

Special provisions relating to land.--The United States reserves the right to prohibit (or to limit the extent of) alien establishment or acquisition of interests in enterprises engaged within its territories in the exploitation of land and other natural resources, provided that it shall accord to nationals and companies of Thailand most-favored-nation treatment in this connection. (Art. 4, para. 2.)

Nationals and companies of Thailand shall be accorded national treatment within the United States with respect to leasing immoveable property needed for their residence or for the conduct of treaty-protected activities and with respect to disposing of property of all kinds by sale, testament, or otherwise. (Art. 5, para. 1.)

The Government of Thailand shall have the right to acquire and own land and buildings required for diplomatic or consular premises in the United States and also to erect buildings for the purposes stated, subject to local building regulations. (Exchange of Notes, No. 898.)

Togolese Republic

Treaty of Amity and Economic Relations, February 8, 1966, 18 U.S.T. 1, T.I.A.S. No. 6193.

Provisions protecting aliens.--Nationals and companies of Togo shall be accorded national treatment with respect to establishing, as well as with respect to acquiring interests in, enterprises of all types for engaging in commercial, industrial, financial, and other business activities within the United States. (Art. 5, para. 1.)

Special provisions relating to land.--The United States reserves the right to limit the extent to which aliens may establish or acquire interests in enterprises engaged within its territories in the exploitation of land or other natural resources, provided that it shall accord to nationals and companies of Togo most-favored-nation treatment in this connection. (Art. 5, para. 1.)

Nationals and companies of Togo shall be accorded national treatment within the United States with respect to leasing real property needed for their residence or for the conduct of treaty-protected activities and with respect to disposing of property of all kinds by sale, treatment, or otherwise. (Art. 6, para. 1.)

Turkey

Treaty of Commerce and Navigation, October 1, 1929, 46 Stat. 2743, T.S. No. 813.

Treaty of Establishment and Sojourn, October 28, 1931, 47 Stat. 2432, T.S. No. 859.

Venezuela

Treaty of Peace, Friendship, Navigation, and Commerce, January 20, 1836, 8 Stat. 466, T.S. No. 366. (Articles relating to commerce and navigation terminated January 3, 1851.)

Special provisions relating to land.--If Venezuelan nationals inherit real estate in the United States but are disqualified from holding it because of alienage, they shall be allowed a term of 3 years to dispose of it, as they may think proper. (Art. 12.)

Vietnam

Treaty of Amity and Economic Relations, April 3, 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890.

Provisions protecting aliens.--Enterprises which are or may hereafter be established or acquired by Vietnamese nationals and companies within the United States and which are owned or controlled by Vietnamese, whether in

the form of individual proprietorships, direct branches, or companies constituted under U.S. laws, shall be accorded national treatment and most-favored-nation treatment in the conduct of their activities. (Art. 5, para. 1.)

Special provisions relating to land.--Vietnamese nationals and companies shall be accorded national treatment within the United States with respect to leasing real property needed for their residence or for the conduct of treaty-protected activities and with respect to disposing of property of all kinds by sale, testament, or otherwise. (Art. 6, para. 1.)

Yugoslavia

Treaty of Commerce and Navigation, October 14, 1881, 22 Stat. 963, T.S. No. 319.

Special provisions relating to land.--Serbian subjects in the United States shall be accorded most-favored-nation treatment in all that concerns the right of acquiring, possessing or disposing of real property. (Art. 2, para. 1.)